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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 670

THE BOARD OF EDUCATION OF THE
CITY OF BIRMINGHAM, ET AL., *Petitioners*,
v.
DWIGHT ARMSTRONG, ET AL., *Respondents*.

LINDA SUE GIBSON, ET AL., *Petitioners*,
v.
CAROLYN ELEANOR HARRIS, ET AL., *Respondents*.

LAWRENCE ROBERTS, ET AL., *Petitioners*,
v.
RALPH STELL, ET AL., *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To The Honorable, The Chief Justice and Associate Justices of The Supreme Court of The United States:

Each of your petitioners was a prevailing party in a District Court action and is now an appellee in an appeal therefrom pending before the Fifth Circuit Court of Appeals. In each appeal, pending a hearing on the merits, the Circuit Court has [illegible] only inal mandatory injunction which has *de facto* reversed the order or judgment appealed from by awarding as against each of your petitioners the affirmative relief to which the respective respondents had failed to sustain their right in the trial court. Petitioners, contending that the form of such orders constitutes an impermissible departure from normal appellate processes, pray the issuance of a writ of certiorari directed to the United States Court of Appeals for the Fifth Circuit limited to the question of the formal validity of such orders as an allowable or proper exercise of appellate judicial power.

The prayer is made for joint consideration of all four[1] cases under Rule 23(5) on the ground that the four orders in question are substantially identical, present the same issue of law and may constitute the entire class of such orders since your petitioners know of no similar rulings by any other Court of Appeals.

OPINIONS BELOW

The opinions of the Court of Appeals are printed in the appendix and have been reported as follows: *Stell v. Savannah-Chatham County Board of Education*, 318 F. 2d 425 (May 24, 1963); *Davis v. Board of School Commissioners of Mobile County, Ala.*, 322 F. 2d 356 (July 9, 1963); *Armstrong v. Board of Educa-*

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[1] In addition to the three captioned cases, a motion to be permitted to file an application for rehearing limited to the form of the order concerned is filed herewith in *Board of School Commrs. of Mobile, et al. v. Birdie Mae Davis, et al.*, Oct. Term, 1963, No. 348, cert. den. 375 U.S. 894 (Oct. 28, 1963). The inclusion of the *Davis* case is solely to have before the Court on a single application, the four related cases in which such appellate orders have been issued.

tion of City of Birmingham, Ala., 323 F. 2d 333 (July 12, 1963); and *Harris* v. *Gibson and Glynn County Board of Education*, 322 F. 2d 780 (September 12, 1963).

The opinions of the District Courts are not sought to be reviewed herein but are included in the appendix for the Court's reference. Two have been officially reported, *Davis* v. *Board of School Commissioners*, 219 F. Supp. 542 (S.D. Ala. June 24, 1963) and *Armstrong* v. *Board of Education*, 220 F. Supp. 217 (N.D. Ala., May 28, 1963). At the time of the issuance of the order of the Fifth Circuit in *Stell* v. *Savannah-Chatham County Board of Education*, only the preliminary findings given in the appendix had been issued. The District Court's decision, as thereafter entered with the Clerk, is reported at 220 F. Supp. 667 (S.D. Ga. 1963).

The denial of the application for issuance of a writ of certiorari in *Davis* is reported at 375 U.S. 894 (October 28, 1963).

JURISDICTION

The review authority of this Court prior to the rendition of a judgment or decree by a Court of Appeals is conferred by 28 U.S.C. § 1254(1); and since each case is now so pending in that Court, this application comes within the time limited by 28 U.S.C. §2101(e). The dates of the issuance of the orders sought to be reviewed are as given in the preceding section.

QUESTION PRESENTED

Does a Court of Appeals have power, pending its determination of an appeal on the merits, to issue an original mandatory injunction which

(a) reverses the appealed-from order or judgment of the District Court by granting the affirmative relief prayed by the unsuccessful parties in the trial court;

(b) alters both the *status quo ante litem* and the *status quo* as of the time the appeal was taken; and

(c) directs the trial court to sign and issue as its own the interim reversal of its earlier order?

STATUTES INVOLVED

28 U.S.C. § 1292(a)(1). Interlocutory Decisions.

"(a) The courts of appeals shall have jurisdiction of appeals from:

> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;" (As am. Oct. 31, 1951, c. 655, § 49, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348; Sept. 2, 1958, Pub. L. 85-919, 72 Stat. 1770)

28 U.S.C. § 1651(a). Writs.

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." (June 25, 1948, c. 646, 62 Stat. 944, amended May 24, 1949, c. 139, § 90, 63 Stat. 102).

28 U.S.C. § 2106. Review: Determination.

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." (June 25, 1948, c. 646, 62 Stat. 963).

STATEMENT OF THE CASES

A number of facts are common to all cases. Each of the four is a school desegregation case—Savannah and Brunswick, Georgia, and Birmingham and Mobile, Alabama—brought as a suit in equity under 28 U.S.C. 1343(3). The jurisdiction of the District Courts has been invoked under the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution as implemented by the Civil Rights Act, (42 U.S.C. § 1983). The respondents have had in each case the same or associated counsel and have asked the same type of relief, resulting in substantial similarity in their pleadings and motions both in the District Courts and in the Court of Appeals for the Fifth Circuit.

In each trial court the respondents' pleadings have prayed a permanent injunction directing some form or plan of desegregation and respondents have asked the same relief by way of preliminary injunction. In each case, the District Court concerned has issued a judgment or order which respondents have appealed to the Court of Appeals as constituting a denial of the injunctive relief so demanded.

On taking each appeal, respondents have prayed an original appellate interlocutory injunction for the same affirmative relief as had been denied by the lower court. The ground stated by respondents has been that the clear absence of legal merit in the rulings of the District Courts makes any delay in granting them final relief, an irreparable injury. The Court of Appeals on each appeal has agreed with respondents and, acting on an accelerated basis[2] without a record or a transcript of the proceedings below, has reversed the lower court by granting the application for appellate injunctive relief substantially as requested. On each appeal, the Circuit has issued its mandate in the form of an order to be signed and issued as that of the District Court from which the earlier order not yet determined on appeal, had issued.[3]

In somewhat greater detail, the nature of the proceedings and character of the orders issued by the trial and appellate courts are here given in the chronological order of the cases.

(a) Savannah-Chatham Board of Education, et al v. Ralph Stell, et al. (5th Cir. Ct. of App. No. 20557)

This action was brought on behalf of negro school children in Savannah alleging injury caused by separate schools and praying preliminary and permanent injunctive relief requiring the defendant School Board of Savannah-Chatham County to submit a plan to reorganize the school system into what plaintiffs described as a "unitary nonracial system". At the trial, proof was made on defense that the plan proposed by respondents would injure both the negro and white school children in Savannah. On the Court's inquiry, respondents refused to proffer any evidence in rebuttal of this issue or in support of the injury averments in their complaint, stating that the law so conclusively presumed such injury to their class that no evidence to show other or different injury in the Savannah area could be considered by the trial court.

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[2] From application through hearing to decision, *Stell*, 4 days; *Davis*, 8 days; *Armstrong*, 39 days; *Gibson*, 2 days.

[3] Although the Fifth Circuit in the later *Davis*, *Armstrong* and *Gibson* opinions refers to *Stell* as authority for the form of injunction in question, Judge Cameron identifies an unpublished order two days earlier as being the first. (App. pp. 60-4a)

The District Court disagreed and, at respondents' request at the close of trial (May 13), immediately issued its preliminary judgment, denying the prayer of the complaint, and giving respondents a right to reopen for further proof. (App. pp. 82a-90a)

Respondents appealed and moved for a preliminary appellate injunction on May 20, 1963, for the same relief denied below (*Stell* Rec. 55). The Court of Appeals set this for hearing on May 24 (*id.* 80), heard it (*id.* 135), and on the same day, entered its order granting the requested injunction (*id.* 136) on the basis of the "All Writs" statute, 28 U.S.C. § 1651(a) (App. p. 1a). For its direction to the District Court to enter the order as its own the Court of Appeals additionally referred to this Court's ruling in *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399 (1923).

(b) Board of School Commissioners of Mobile County, et al. v. Birdie Mae Davis, et al. (5th Cir. Ct. of App. No. 20657)

The complaint in this case was substantially similar to that in *Stell*, and respondents, in addition to praying a permanent injunction therefor, moved for a preliminary injunction requiring the submission within thirty days of a desegregation plan to commence in September, 1963. The preliminary injunction in the form prayed by plaintiffs was denied on June 24, 1963, but the Court directed the School Board to submit such a plan to be heard at the trial, which had then been scheduled for November.[4]

On July 1, 1963, respondents moved the Court of Appeals for an injunction pending appeal "and for other orders". On the same day the Court ordered a hearing on July 8 (Davis Rec., p. 19) and granted respondents' application on July 9 (*id.* pp. 21-8). In its decision the Court said:

> "The 'All Writs' statute, 28 U.S.C.A. § 1651 gives us the power to grant the relief sought by the plaintiffs. *Stell v. Savannah-Chatham County Board of Education*, Fifth Circuit, 1963, F. 2d [No. 20557, May 24, 1963]. However, as in that case, we think it is more appropriate to frame the injunction and direct by mandate that this injunction be made the order of the District Court." (App. p. 9a)

On an application for rehearing, the order was recalled and reissued on July 18 to conform to the form used in the interval in the Court's decision in *Armstrong*. In the opinion of the dissenting Judge:

> "The modification by the majority of their prior order in this case compounds error. (App. p. 13a).
>
> "* * *
>
> ". . . what has been done is at the expense of the judicial process. A Court of Appeals should not sit as a District Court in chancery . . . without facts before it to serve as a basis for the decree.

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[4] It was tried on the dates scheduled and is now *sub judice*.

> The All-Writs Statute, 28 U.S.C.A. § 1651, does not authorize this . . . more constitutional rights will be lost than gained in the long run by departure from the procedures which have stood the test of time, and which are a part of due process of law as we have heretofore known it." (App. p. 15a).

A dissent was also filed by Judge Cameron after rejection of his recommendation for an *en banc* hearing (*Davis* Rec. 41). A petition for review by certiorari on the merits was filed and denied by this Court on October 28, 1963; *Board of School Commissioners of Mobile County* v. *Davis*, 375 U.S. 894. No reconsideration of the merits discussed in that application is requested, the concurrent motion served herewith being intended to consider only the formal validity of the injunctive order of the Fifth Circuit.

(c) Armstrong v. Board of Education of City of Birmingham, Ala. (5th Cir. Ct. of App. No. 20595)

In this case, as in the two cases previously detailed, the complaint sought a mandatory injunction requiring the School Board to reorganize the school system along stated lines. A preliminary injunction for the same relief was made but by stipulation was merged into the prayer for permanent relief and the case was tried on the merits. The Court found that the plaintiffs in the case had failed to make any effort to comply with the Alabama Pupil Placement Act which this Court had held constitutional; *Shuttlesworth* v. *Birmingham Board of Education*, 358 U.S. 101 (1958). The District Court retained jurisdiction to rehear the plaintiffs on any contention that the manner of application to them of that statute was improper. (App. p. 108a). On June 3, 1963, the *Armstrong* respondents moved the Court of Appeals to issue an injunction pending appeal which would grant the relief denied below. (*Armstrong* Rec. p. 1). This was heard on June 26 (*id.* 21) and the requested injunction was granted on July 12, Judge Gewin dissenting (App. p. 19a). An application for rehearing *en banc* was denied July 22, Judge Cameron filing an additional dissenting opinion on July 30.

In its decision, the Circuit Court, Rives, J., directed the issuance of an order by the District Court "In line with the procedure . . . in *Stell*, . . ." (App. p. 29a) and Tuttle, C. J., concurring specially, stated that a definite plan "should be required by an injunction . . . pending the appeal of this case on the merits in this Court. See *Stell* . . . , *Davis* . . ." (App. p. 31a). Judge Gewin, in an extended dissent, stated:

> "It should be noted quickly that the majority opinion leaves little to be decided when the case reaches this Court on the merits. Under the guise of 'injunction pending appeal' that opinion substantially decides the case and renders moot many questions which could arise when the case reaches the Court for final decision after a review of the record . . . The action in this case is taken without any pretense that the Court has taken so much as a hurried glance at the record." (App. p. 32a)

Judge Gewin then discussed the questions involved in issuing such an injunction pending appeal and distinguished the action taken in *Stell* on the ground that the Court had there considered it was reviewing an interlocutory ruling. (App. p. 41a)

Judge Cameron also dissented saying:

> "The decision of this panel involves questions of procedure which have for some weeks plagued

and are still plaguing the Court. The Judges of the Court are sharply divided on these questions and not only the lawyers of the Circuit, but the public generally, are displaying open concern with respect to inconsistent positions which they conceive are being taken by the Court. . . .

"The procedure followed by the majority here is one which, in my opinion, is not sanctioned by the law. The hearing before these three Judges *was not an appeal.* Rather, it was what the Third Circuit has termed something 'in the nature of an original proceedings . . .' It was the substitution of a hearing on 'injunction pending appeal' for a hearing on appeal. Theoretically the appeal is still pending, but it is apparent that there is little or nothing more to hear since the decision and order of the majority of the panel are on the merits of the case, deciding in full, without the benefit of any record of the evidence in the lower court, the questions of law and fact which were before that court in its extended hearing. (App. pp. 58a-60a).

* * *

"The last sentence of Judge Bell's special concurrence in the July 9th hearing characterizes poignantly the dilemma into which this Court has been plunged since it set itself the task of inventing special procedures for the handling of such cases:

> 'This case serves as a classic example of the pitfalls to be encountered, with the attendant disruption and delays in the orderly administration of justice, when courts depart from the time-tested processes of law.'" (App. p. 60a)

(d) Harris et al. v. Gibson and Glynn County Board of Education et al. (5th Cir. Ct. of App. No. 20871)

This action followed the pattern of the preceding three, except that in this case respondents filed their prayer for temporary and permanent injunctions as intervenors in a suit brought to restrain the Board of Education from effecting a pupil transfer except in accordance with Court order and the Georgia School Code. The action was commenced in August, 1963, and on motion of the *Gibson* respondents to intervene and be heard on the broad issue of desegregation, the Court set the matter down for a pretrial hearing on September 5. At that hearing, the Court allowed the requested intervention and then heard arguments both on respondents' motion for a preliminary injunction and the petitioners' motion for judgment for failure of the School Board to have held a public hearing under the Georgia School Code prior to their approving the transfers in question.

To limit the issues and to obviate the jurisdictional objection, the Court by pretrial order directed the School Board to promptly hold an open record hearing under the Georgia Code, limiting the parties on the subsequent trial to the issues and evidence presented before the Board. The Court further required the Board to recommend a complete plan of desegregation for the County, including the six transfers complained of.

Respondents appealed this order to the Fifth Circuit on the ground that it constituted a denial of their motion for a preliminary injunction enforcing the transfers before trial. At the same time, they prayed an interlocutory appellate injunction for the relief stayed below. The order of the District Court was entered on September 6; the application to the Court of Appeals was filed on September 10 and was heard and decided on September 12. (*Gibson* Rec. 8-9, 22 and 23) In its decision granting the injunction to respondents, the Court of Appeals held that the pretrial order of the District Court was both an interlocutory appealable order under 28 U.S.C. § 1292 and an appealable final order under 28 U.S.C. § 1291. (App. p. 89a)

REASONS RELIED ON FOR ALLOWANCE OF WRIT

Each of the considerations referred to in this Court's Rule 19(1)(b) exists with respect to the Fifth Circuit opinions for which review is sought.

1. They are contrary to the decisions in the only other four cases which petitioners have found of an application to a Federal Court of Appeals for a mandatory injunction to grant final relief pending determination of an appeal on the merits. There is one such case each in the Sixth and Ninth Circuits, the other two being in the Fifth Circuit itself (*infra* p. 21-3).

2. The Federal law question regarding the powers of United States Courts of Appeals to grant this type of order—either as a matter of inherent authority, by precedent in equity, or through legislative enactment, is both unique and important. The four orders in question appear to be the only four published orders of this nature issued by any United States Court of Appeals.

3. In the opinion of your petitioners, the action of the Court of Appeals in the issuance of the orders concerned has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision. Petitioners concede that applications such as this are not favored because made during the pendency of appeals in the Court of Appeals. However, it is the position of petitioners, and one we believe reasonably taken, that the "deviation from normal appellate processes"

phrase in this Court's Rule 20 is more descriptive of the action of the Court of Appeals in the four captioned cases than of the present application for review.

4. Petitioners recognize that the merits of the pending appeals involve controversial political and social issues, issues evocative of strong emotional reactions not always limited to the protagonists. Since we pray no review on these issues, we do not urge their importance as a basis for the granting of this petition. We do urge the corollary, however, that such cases should receive the same tempered measure of judicial consideration as more mundane issues, and should not become a quasi-administrative and summary exception to the normal procedures of the Judicial Branch.

5. Three of the four orders abrogate otherwise applicable and constitutionally valid state legislation.

ARGUMENT

What we are here concerned with, is a relatively narrow question. We deal with mandatory as opposed to prohibitory injunctions and only those which alter rather than maintain or restore a *status quo*. We are concerned solely with appellate interlocutory injunctions and only such of those as grant relief to the appellant which is the same as the relief he seeks by appellate process itself, i.e., 'final' relief in the action.

It would be futile to deny that the broad powers of the United States courts include every form of writ which may be required to assure to the ultimately prevailing party an effective and meaningful remedy. We do deny, however, that such authority extends to the granting of anticipatory relief in the nature of instant reversal based on appellate prejudgment of the merits.

In the following argument, your petitioners will attempt to show first, that there is no statutory basis for the orders in question nor any precedent in equity or in the opinions of other courts. Second, we will endeavor to show that the issuance of the orders in question conflicts with decisions in the Sixth and Ninth Circuits and with the earlier decisions of the Fifth Circuit and deviates from the judicial policies declared by this Court.

I. THE AUTHORITIES CITED BY THE COURT OF APPEALS FOR THE FIFTH CIRCUIT DO NOT SUSTAIN THAT COURT'S POWER TO ISSUE A MANDATORY INJUNCTION, GRANTING THE FULL RELIEF SOUGHT BELOW, PENDING DETERMINATION OF AN APPEAL ON THE MERITS.

(a) The "All Writs" Statute (28 U.S.C. § 1651)

(1) Statutory Language

The Court of Appeals assumed jurisdiction to grant relief in these cases primarily under the "All Writs" statute, 28 U.S.C. § 1651, which reads:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their jurisdictions *and agreeable to the usages and principles of law.* (Emphasis added).

This Court has held that the power given to the courts under this provision of the Judicial Code is limited, and must be exercised in accordance with the principles of equity jurisprudence which were known to the common law, (*United States* v. *Morgan*, 346 U.S. 502 (1954); *United States* v. *Hayman*, 342 U.S. 205, 221 n. 35 (1952)), and which have attached themselves over the years to the particular writ in question (*Price* v. *Johnston*, 334 U.S. 266, 282 (1948)).

Thus, in *DeBeers Mines* v. *United States*, 325 U.S. 212 (1945), this Court vacated an injunction issued under the statute, after reviewing the "course of decision in chancery," and finding that "No relief of this character has been thought justified in the long history of equity jurisprudence." (*id.*, 223)

(2) Principles of Equity

The purpose of the writ of preliminary mandatory injunction at common law was "wholly preventive, prohibitory or protective," with its use being restricted to situations where its effect would be to restore the plaintiff to his "former" or "original" position. 4 *Pomeroy's Equity Jurisprudence*, §§ 1337, 1359 (4th ed. 1919). Thus, where the object of the writ is to maintain or restore the *status quo ante litem*, the power of the federal courts to issue preliminary mandatory injunctions is clearly recognized. *In re Lennon*, 166 U.S. 548 (1897); *Bergen Drug* v. *Parke Davis Co.*, 307 F. 2d 725 (3rd Cir. 1962).

The preliminary mandatory injunction, like the preliminary prohibitory injunction, has traditionally served "to keep the parties, while the suit goes on, as far as possible in the respective positions they occupied when the suit began" (*Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F. 2d 738, 742 (2d Cir. 1953)). But its issuance can be justified only when necessary to preserve or restore the *status quo* pending final determination of the merits of a litigation. 28 Am. Jur. "Injunctions" § 17; 15 ALR 2d 213, 234; *Toledo A.A. and N.M. Ry. Co.* v. *Pennsylvania Co.*, 54 Fed. 730 (N.D. Ohio 1893).

So firmly established is the equitable principle that mandatory preliminary injunctive relief will be granted only to maintain the *status quo ante litem* that the Federal district courts have refused, through the years, to grant relief beyond that limited scope. See *Clune* v. *Publishers Assoc. of New York City*, 214 F. Supp. 520 (S.D.N.Y. 1963); *Gantt* v. *Clemson Agr. Coll. of So. Car.*, 208 F. Supp. 416 (W.D. So. Car. 1962); *Willheim* v. *Murchison*, 203 F. Supp. 478 (S.D.N.Y. 1962), aff'd *Willheim* v. *Investors Diversified Services, Inc.*, 303 F. 2d 276 (2d Cir. 1962); *Winton Motor Carriage Co.* v. *Curtis Publishing Co.*, 196 Fed. 906 (E.D. Pa. 1912); and *American Lead Pencil* v. *Schneegass*, 178 Fed. 735 (N.D. Ga. 1910).

In those cases where the district courts have exceeded their equity jurisdiction and granted relief requiring affirmative action beyond that necessary to reinstate a pre-existing *status quo*, they have been summarily reversed. See *Tanner Motor Livery* v. *Avis, Inc.*, 316 F. 2d 804 (9th Cir. 1963); *Miami Beach Federal Savings and Loan Assoc.* v. *Callander*, 256 F. 2d 410 (5th Cir. 1958); *Warner Bros.* v. *Gittone*, 110 F. 2d 292 (3d Cir. 1940); and *United States* v. *Adler's Creamery*, 107 F. 2d 987 (2d Cir. 1939).

A correlative equity principle is that the merits of the controversy are not to be decided on an application for preliminary relief. *Tanner Motor Livery* v. *Avis, Inc., supra*; and *Miami Beach Federal Savings & Loan Assoc.* v. *Callander, supra*. From this principle has developed the firmly rooted rule that where the granting of a preliminary injunction would give to the plaintiff all the relief to which he would be entitled were he to obtain a final decree in his favor on the merits, the request for preliminary relief should be denied. *Tanner Motor Livery* v. *Avis, Inc., supra*; *Mack* v. *General Motors Corp.*, 260 F. 2d 886 (7th Cir.

1958); *Westinghouse* v. *Free*, 256 F. 2d 806 (7th Cir. 1958); *United States* v. *Adler's Creamery, supra*; *Gantt* v. *Clemson Agr. Coll. of So. Car., supra*; *Willheim* v. *Investors Diversified Services, Inc., supra*; and *American Lead* v. *Scheegass, supra*.

In each of the instant cases, the application of respondents for injunctive relief both temporary and permanent was to alter a pre-existing status in their favor. To give them such relief preliminarily is to give them what they would at most be entitled to if they had succeeded on the merits after trial and appeal. As the Third Circuit said in *Warner Bros.* v. *Gittone, supra*:

> . . . the effect of the preliminary injunction which the court granted was not to preserve the status quo but rather to alter the prior status of the parties fundamentally. Such an alteration may be directed only after final hearing, the office of a preliminary injunction being, as we have pointed out, merely to preserve pendente lite the last actual noncontested status which preceded the pending controversy. . . .
>
> Irreparable loss resulting from refusal to accord plaintiff a new status, as distinguished from interference with rights previously enjoyed by him, does not furnish the basis for interlocutory relief. 110 F. 2d 292, 293.

(b) Other Statutes

In addition to its stated reliance on 28 U.S.C. § 1651, the Court of Appeals has referred to 28 U.S.C. §§ 1291 and 1292 as sources of such authority (App. pp. 1a, 2a, 80a). 28 U.S.C. § 1291 confers upon courts of appeals "*jurisdiction of appeals* from all final decisions of the district courts of the United States. . . ." 28 U.S.C. § 1292(a) (1) gives the courts of appeals “*jurisdiction of appeals* from: (1) Interlocutory orders of the district courts of the United States . . .” (italics ours).

Petitioners submit that the Fifth Circuit is clearly in error in its reference to these provisions. Both sections confer jurisdiction over the merits of an appeal, not a new and different writ power. Petitioners concede that these appeals are properly pending in the Fifth Circuit, that that Court's jurisdiction extends to their merits. What we say is that this does not concern the form in which the Court must exercise its admitted jurisdiction, this does not change the nature of the judicial process.

(c) Opinions Cited by the Court of Appeals

In its opinions in these cases, the Court of Appeals has cited as its precedent on appellate injunctive power the cases themselves. It has additionally cited decisions, not here relevant, to distinguish between final and interlocutory orders, the power of District Courts over substantive aspects of school plans, and the power of a Court of Appeals to make its mandate effective through District Court orders.

But, apart from the cases for which review is here sought no other decision referred to by the Court of Appeals is authority for the existence of appellate power to issue the type of injunction in question. Although four other decisions are cited for the claimed authority, each of them concerns only a prohibitory order intended to prevent a change in the *status quo* which would make ineffective the appellate remedy.

United States v. *Wood*, 295 F. 2d 772 (5th Cir. 1961), (cited in *Gibson*, App. p. 80a) reversed a denial by the

District Court of a temporary restraining order against state prosecution pending a hearing for preliminary injunction because the District Court's action determined "substantial rights of the parties which will be irreparably lost if review is delayed until final judgment" (295 F. 2d 772, 778).[5]

Cooper v. *Aaron*, 358 U.S. 1 (1958) was also cited in *Gibson*. It affirms *Aaron* v. *Cooper*, 257 F. 2d 33 (8th Cir. 1958), reversing a District Court suspension of a court approved school integration plan after a hearing of the case on the merits. In its *Stell* opinion (App. p. 1a), the Fifth Circuit cited the other *Aaron* v. *Cooper* decision, 261 F. 2d 97 (8th Cir., 1958), restraining the leasing of public schools to a private school corporation pending a final determination on the merits. Also cited in *Stell* was *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399 (1923), where this Court upheld the power of a Court of Appeals under the "All Writs" statute to direct a District Court to enjoin a party to a suit before it from interfering with the Court's process by bringing a conflicting suit in another jurisdiction.

Your petitioners submit that none of the foregoing decisions constitutes acceptable precedent for the extraordinary writ powers claimed by the Court of Appeals in the instant cases.

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[5] Since the granting or denial of a temporary restraining order is not ordinarily appealable, the Circuit held this to be a reviewable "final order" under 28 U.S.C. § 1291.

II. THE ORDERS SOUGHT TO BE REVIEWED ARE IN CONFLICT WITH THE DECISIONS IN OTHER CIRCUITS AND WITH PRIOR DECISIONS IN THE FIFTH CIRCUIT.

Your petitioners' research has found only four other cases in which affirmative interlocutory injunctions approximating final relief have been asked of a United States Court of Appeals. In each of the four such relief has been denied.

In *Dunn* v. *Retail Clerks International Association*, 299 F. 2d 873 (6th Cir. 1962), the Court of Appeals refused to issue a mandatory injunction pending appeal compelling a regional director of the National Labor Relations Board to bring legal action against alleged unlawful picketing or, in the alternative, to issue an injunction directly enjoining the picketing. The relief had been denied by the District Court, in an action brought by the owners of the property being picketed, not by the regional director of the NLRB. The District Court also had denied an application for a mandatory injunction pending appeal.

The statement of the case by the Court of Appeals indicates its similarity to the present litigation (299 F. 2d 873, 874):

> "The relief prayed for here is much broader than a mere restraining order preserving the *status quo*.
>
> * * * * * * * * * *
>
> "The mandatory order which appellants request is the ultimate relief sought in the District Court and in this appeal. To obtain such relief appellants would have to prevail on the merits of the case. We ought not to grant temporary relief which would finally dispose of the case on its merits . . ."

The same conclusion was reached by the Court of Appeals for the Ninth Circuit in *Hess* v. *Woods*, 185

F. 2d 404 (9th Cir. 1950). The District Court had denied an injunction against the continuing enforcement of the Housing and Rent Act of 1947 on the ground that it was being asked to change the *status quo*. Plaintiffs applied to the Court of Appeals for an immediate "restraining order" and "injunction" against the Housing Expediter and his subordinates, which in denying the application, stated (185 F. 2d 404):

> "In short, we are asked to suspend all activity of an important governmental agency before the appeal is before us for adjudication as to whether the District Court should take jurisdiction and try the case on the merits. No order with such far-reaching consequences should be made by any court before the merits of the controversy have been tried and adjudicated."

In two earlier civil rights type cases, the Court of Appeals for the Fifth Circuit has itself denied mandatory injunctive relief pending determination of the merits of the appeals on the same ground, following denials of such injunctions by the trial court. In *Meredith* v. *Fair*, 305 F. 2d 341 (5th Cir. 1962), an appeal was taken from a District Court denial of an interlocutory order compelling a state university to admit the negro plaintiff. The plaintiff then moved the Court of Appeals for such an injunction during the pendency of his appeal. In denying this motion, the Court noted that "the testimony taken before the district court is not yet available to this Court" and stated that judgment should be withheld until there had been "an opportunity to study the full record and testimony on the hearing before the district court" (*id.*, 341-2).

The same ruling was made in *Greene* v. *Fair*, 314 F. 2d 200 (5th Cir. 1963), where the District Court had abstained from ruling on plaintiff's university admission request, pending his applying to the admissions committee of the school. Plaintiff prayed for an injunction pending appeal to compel his immediate admission, asserting that 28 U.S.C. § 1651 gave the Court power to take such action. The Court denied any interlocutory mandatory relief, pointing out that (*id.*, 202) "The rules of this Court make possible a prompt hearing of all regularly docketed appellate cases."[6]

As to the views of that Court on such injunctions when issued by a District Court, Chief Judge Tuttle has stated:

> "Upon analyzing the trial court's order, issued without any evidence being submitted, even though perhaps at least partially at the instigation and insistence of the litigants, it appears much broader than the relief requested and than the question at hand. The matter before the court was a motion for a preliminary injunction which by its nature has the purpose of preserving the status quo to prevent irreparable injuries until the merits of the issues can be decided.
>
> * * * *
>
> "The judgment awarded appears to provide the plaintiffs with practically all of the relief, if not more, than they sought on the merits. . . .
>
> * * *
>
> "We have repeatedly held that an order for a temporary injunction does not and cannot decide

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[6] Possibly because nothing is left to be accomplished by a hearing on the merits, it is only in *Stell* of the four cases here considered that respondents have filed a record or taken other action to bring the matter on for a hearing on appeal. Moreover, in *Stell* within the past week, appellants have moved for further time to file a supplemental record covering District Court proceedings directed by the interlocutory order here complained of and which occurred *after the appeal was taken*—necessarily relevant only to issues created by the appellate injunction, not the merits of the case as tried!

the merits of the case . . ." *Miami Beach Federal Sav. & Loan Assoc. v. Callander*, 256 F. 2d 410, 415 (5th Cir. 1958)

III. THIS COURT, IN THE EXERCISE OF ITS SUPERVISORY POWERS OVER THE LOWER FEDERAL COURTS, SHOULD VACATE THE INJUNCTIONS GRANTED IN THESE CASES AND REMAND TO THE COURT OF APPEALS FOR PROMPT HEARINGS ON THE MERITS.

The procedural issue raised by this application is a narrow, but extremely important one in the administration of justice. There is no effective control except judicial self-control in defining the incidents of judicial power. It is in cases such as these four, whose merits concern deeply controversial issues, that courts will always have the greatest difficulty in adhering to established practice.

Mr. Justice Holmes' famous dissent in *Northern Securities Co. v. United States*, 193 U.S. 197, 400-1 (1904), describes the problem:

> "Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well-settled principles of law will bend."

Mr. Justice Frankfurter, concurring in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 149 (1951), recognized that where legal issues were "inescapably entangled in political controversies" and "touch the passions of the day," it was the duty of the Courts to "dispose of a controversy within the narrowest confines that intellectual integrity permits." Concurring in *Dennis v. United States*, 341 U.S. 494, 528 (1951), he said:

> "Unless we are to compromise judicial impartiality and subject these defendants to the risk of an *ad hoc* judgment influenced by the impregnating atmosphere of the times, the constitutionality of their conviction must be determined by principles established in cases decided in more tranquil periods."

This Court in *DeBeers Mines v. United States*, 325 U.S. 212, 222 (1945), adhered to precedent in the face of strong pressure from the Government to increase the scope of judicial authority:

> "This suit, as we have said, is not to be distinguished from any other suit in equity. What applies to it applies to all such."

* * *

The powers exercised by the Court of Appeals are not known to equity, are not granted by statute, they circumvent the established course [illegible]ellate review, directly affect the integrity of the ju[illegible]al process, the administration of the courts and create conflict between circuits. Review by certiorari should be granted as prayed.

Respectfully submitted,

Geo. Stephen Leonard
Reid B. Barnes
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Of Counsel:

R. Carter Pittman
Charles J. Bloch
J. Walter Cowart
Richard L. Hirshberg
Robert C. Maynard

APPENDIX

OPINIONS OF COURTS BELOW

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

RALPH STELL ET AL., *Appellants*,

v.

SAVANNAH-CHATHAM COUNTY BOARD OF EDUCATION ET AL.,
Appellees.

No. 20557.

May 24, 1963.

* * * * * * * * * *

E. H. Gadsden, B. Clarence Mayfield, Savannah, Ga., Constance Baker Motley, New York City, for appellants.

J. Walter Cowart, Savannah, Ga., Charles J. Bloch, Macon, Ga., E. Freeman Leverett, Elberton, Ga., R. Basil Morris, Savannah, Ga., for appellees.

Before TUTTLE, Chief Judge, and RIVES and BELL, Circuit Judges.

TUTTLE, Chief Judge.

This is a motion for an injunction to be entered by this Court pending our consideration on the merits of an appeal from an order of the District Court for the Southern District of Georgia dated May 13, 1963, denying appellants' motion for a preliminary injunction requiring a prompt start to the desegregation of the Savannah-Chatham County Schools.

A judgment denying a motion for preliminary injunction is an appealable order, though interlocutory. 28 U.S.C.A.

§ 1292(1). This Court has the power to issue all writs necessary or appropriate in aid of its jurisdiction and agreeable to the usages and principles of law. 28 U.S.C.A. § 1651(a). An injunction pending appeal is such a writ. Aaron v. Cooper, 8 Cir., 261 F.2d 97, 101. The power granted to Courts of Appeal under Section 1651, commonly known as the "All Writs" statute is meant to be used only in the exceptional case where there is clear abuse of discretion or usurpation of judicial power. Bankers Life & Casualty Company v. Holland, 346 U.S. 379, 74 S.Ct. 145, 98 L.Ed. 106. It should be invoked only in "extreme cases." LaBuy v. Hawes Leather Company, 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290. This is such a case.

The trial court made the following finding of fact touching on the critical question as to whether the primary and secondary schools of Savannah-Chatham County are racially segregated:

> "The primary and secondary public schools of Savannah-Chatham County are divided into schools for white pupils and schools for negro pupils and admission thereto is limited to applicants of the respective races."

The Supreme Court of the United States, in Brown v. Board of Education of Topeka, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, said:

> "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

This decision by the Supreme Court should have ended the matter for the district court to the extent that upon its making this determination its duty was then to do what the Supreme Court directed to be done upon the second appearance of the Brown v. Board of Education case in the Supreme Court, 349 U.S. 294, at page 300, 75 S.Ct. 753, at page 756; 99 L.Ed. 1083, where the Court said:

> "The courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. *Once such a start has been made*, the courts may find that additional time is necessary to carry out the ruling in an effective manner." (Emphasis added).

Instead of doing this the trial court permitted an intervention by parties whose sole purpose for intervening was to adduce proof as a factual basis for an effort to ask the Supreme Court to reverse its decision in Brown v. Topeka Board of Education. The court then permitted evidence in support of this approach by the intervenors, and denied the appellants' motion for preliminary injunction solely on the basis of such evidence, which, briefly stated, tended to support the thesis that compliance with the Supreme Court's decision would be detrimental to both the Negro plaintiffs and to white students in the Savannah-Chatham County school system.

The district court for the Southern District of Georgia is bound by the decision of the United States Supreme Court, as are we. Unless and until that Court overrules its decision in Brown v. Topeka, no trial court may, upon finding the existence of a segregated school system, refrain from acting as required by the Supreme Court merely because such district court may conclude that the Supreme Court erred either as to its facts or as to the law.

It is, therefore, clear that on the day of the entry by the trial court of its order it was a clear abuse of its discretion for the trial court to deny appellants' motion for a preliminary injunction requiring the defendant School

Board to make a prompt and reasonable start towards desegregating the Savannah-Chatham County schools.

In such circumstances, because it has now been more than nine years since the Supreme Court made it plain what the duties of the Boards of Education are under such circumstances, and because any further delay might prevent the enjoyment by the appellants of their clear rights as of the beginning of a new school year in September, 1963, we must determine what relief should be granted in response to this present motion.

We have heretofore concluded that this Court has the power to grant an injunction pending the final hearing of the case on the merits in the Court of Appeals. However, it is clearly more desirable for injunctive relief to be granted at the level of the trial court rather than by an appellate court if the same necessary results can be accomplished. Included in the powers of the Court of Appeals under the All-Writs Statute, is the power of the Court of Appeals to frame the terms of an injunction and direct the trial court to enter such injunction and make it the order of the trial court. See Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 43 S.Ct. 458, 67 L.Ed. 719. There the Supreme Court said:

> "Under § 262 of the Judicial Code [the predecessor of the All-Writs statute] [the Court of Appeals] had the right to issue all writs not specifically provided for by statute which might be necessary for the exercise of its appellate jurisdiction. It could, therefore itself have enjoined the Toledo Company from interfering with the execution of its own decree, Merrimac River Savings Bank v. Clay Center, 219 U.S. 527, 535 [31 S.Ct. 295, 55 L.Ed. 320]; or it could direct the District Court to do so, as it did." 261 U.S. 399, 426, 43 S.Ct. 458, 465, 67 L.Ed. 719.

We think it appropriate, therefore, to frame an injunction and direct by mandate that this injunction be made the order of the District Court.

It is, therefore, ordered that the District Court for the Southern District of Georgia enter the following judgment and order:

> "The defendant, Savannah-Chatham County Board of Education and the other individual defendants (naming them specifically) and their agents, servants, employees, successors in office and those in concert with them who shall receive notice of this order, be and they are hereby restrained and enjoined from requiring and permitting segregation of the races in any school under their supervision, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially non-discriminatory basis with all deliberate speed, as required by the Supreme Court in Brown v. Board of Education of Topeka, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083.
>
> "It is further ordered, adjudged and decreed that said persons be and they are hereby required to submit to this Court not later than July 1, 1963, a plan under which the said defendants propose to make an immediate start in the desegregation of the schools of Savannah-Chatham County, which plan shall include a statement that the maintenance of separate schools for the Negro and white children of Savannah shall be completely ended with respect to at least one grade during the school year commencing September, 1963, and with respect to at least one additional grade each school year thereafter."

This order shall remain in effect until the final determination of the appeal of the within case in the Court of Appeals for the Fifth Circuit on the merits and until the further order of this Court. During the pendency of this order the trial court is further directed to enter such other and further orders as may be appropriate or necessary in carrying out the expressed terms of this order.

The Clerk is directed to issue the mandate forthwith.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

BIRDIE MAE DAVIS ET AL., *Appellants*,

v.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ALABAMA ET AL., *Appellees*.

No. 20657.

July 9, 1963.

On Rehearing July 18, 1963.

Dissenting Opinion July 30, 1963.

* * * * * * * * * * *

Vernon Z. Crawford, Mobile, Ala., C. B. Motley, New York City, for appellants.

George F. Wood, Mobile, Ala., Joseph F. Johnston, Birmingham, Ala., for appellees.

Before BROWN, WISDOM and BELL, Circuit Judges.

PER CURIAM.

Plaintiffs here seek an injunction by this Court pending our determination of the merits of an appeal from an order entered on June 24, 1963, by the District Court for the Southern District of Alabama. This suit originated when Plaintiffs filed a class action seeking the desegregation of the Mobile County school system. Plaintiffs sought an immediate order requiring the Defendant School Commissioners' to submit a plan of desegregation within thirty days. This motion was denied by the District Court. In the alternative, Plaintiffs sought a preliminary and permanent injunction prohibiting the further operation of segregated schools. The Court took this motion under submission and ordered briefs to be filed within a specified time. Plaintiffs appealed from this ruling asserting that the failure to immediately rule on the motion for preliminary injunction amounted to a denial of the motion. On that appeal this Court held that the trial Judge had not abused his discretion. Davis v. Board of School Commissioners of Mobile County, 5 Cir., 1963, 318 F.2d 63.

Subsequently, the District Court held a hearing and made the following determination. By its order of June 24, the Court denied Plaintiffs' motion for preliminary injunction. The case was set for trial on November 14, 1963 and the Defendants were directed "to present at the trial * * * a specific plan for the operation of the schools under their authority and control on a racially non-discriminatory basis, consistent with the principles established by the Supreme Court, to commence not later than the beginning of the 1964-65 school year." It is from this order that Plaintiffs have appealed to this Court, seeking in the meantime an injunction requiring the Mobile County schools to commence integration not later than September 1963.

We are in agreement with Plaintiff's theory. The Defendant Board has not come forward with an acceptable reason why the integration program should be further delayed. No one disputes that the public schools of Mobile County are presently operated on a segregated basis.

> "It is now more than nine years since this Court held in the first Brown decision * * * 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, that racial segregation in state public schools violates the Equal Protection Clause of the Fourteenth Amendment.

* * * * * * * * *

> "Given the extended time which has elapsed, it is far from clear that the mandate of the second Brown decision [349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083] requiring that desegregation proceed with 'all deliberate speed' would today be fully satisfied by types of plans or programs for desegregation of public educational facilities which eight years ago might have been deemed sufficient. Brown never contemplated that the concept of 'deliberate speed' would countenance indefinite delay in elimination of racial barriers in schools * * *." Watson v. City of Memphis, 1963, 373 U.S. 526, 83 S.Ct. 1314, 10 L.Ed.2d 529.

> "Now * * * eight years after [the second Brown decision] was rendered and over nine years after the first Brown decision, the context in which we must interpret and apply this language ['all deliberate speed'] to plans for desegregation has been significantly altered." Goss v. Board of Education of City of Knoxville, 1963, 373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed.2d 632.

The District Judge in his memorandum opinion discusses two principal reasons why preliminary injunctive relief should not now be granted. The first is that there would be an impossible administrative burden placed on the school system. The second is the Court's belief, based upon experience over the past several years in other race civil rights matters, that if this action is not too hastily taken, the problem will work itself out with no strife or similar consequences.

For reasons which bear on both of them, we think neither of these grounds is sufficient. The administrative problem is not one created by the Plaintiffs. They have for nearly a year sought without success to get the school authorities to desegregate the schools. The fact that the suit was not filed until March 1963 is not therefore of controlling importance. As to the second ground, there is nothing on the present record to afford either the District Judge or this Court any assurance that the requested forebearance will produce effective results. The Defendants have not even answered as yet. They have filed a motion to dismiss for failure to state a claim. Although it seems to be acknowledged on all hands that a racially segregated system is still maintained, the Defendants' legal position under this motion is that the Plaintiffs have not set forth a claim entitling them to relief. So far as this record shows, the Defendant school authorities have not to this day ever acknowledged that (a) the present system is constitutionally invalid or (b) that there is any obligation on their part to make any changes at any time. At this late date the Plaintiffs, who represent Negro children who are presently being denied constitutional rights, are entitled to minimum effective relief. With the trial date now fixed in November, it means that effective relief is denied for another school year with no assurance that even at such later date anything but a reaffirmation of the teaching of the Brown decision will be forthcoming. The Plaintiffs showed a clear case entitling them to interim relief pending a final hearing, and it was an abuse of the District Court's discretion not to enter a preliminary injunction.

The "All Writs" statute, 28 U.S.C.A. § 1651, gives us the power to grant the relief sought by Plaintiffs. Stell v. Savannah-Chatham County Board of Education, 5 Cir., 1963, 318 F.2d 425. However, as in that case, we think it more appropriate to frame the injunction and direct by mandate that this injunction be made the order of the District Court.

It is therefore, ORDERED that the District Court for the Southern District of Alabama enter the following judgment and order:

> "The Defendant, Board of School Commissioners of Mobile County and the other individual Defendants

(naming them specifically) and their agents, servants, employees, successors in office and those in concert with them who shall receive notice of this order, be and they are hereby restrained and enjoined from requiring and permitting segregation of the races in any school under their supervision, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially nondiscriminatory basis with all deliberate speed, as required by the Supreme Court in Brown v. Board of Education of Topeka, 1955, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083.

"It is further ordered, adjudged and decreed that said persons be and they are hereby required to make an immediate start in the desegregation of the school of Mobile County, and that a plan be submitted to the District Court by August 1, 1963, which shall include a statement that the maintenance of separate schools for the Negro and white children of Mobile County shall be completely ended with respect to the first grade during the school year commencing September 1963, and with respect to at least one successively higher additional grade each school year thereafter."

The District Court may modify this order to defer desegregation of rural schools in Mobile County until September 1964, should the District Court after further hearing conclude that special planning of administrative problems for rural schools in the county make it impracticable for such schools to start desegregation in September 1963.

This order shall remain in effect until the final determination of the appeal of the within case in the Court of Appeals for the Fifth Circuit on the merits, and until the further order of this Court. During the pendency of this order the trial court is further directed to enter such other and further orders as may be appropriate or necessary in in carrying out the expressed terms of this order.

The Clerk is directed to issue the mandate forthwith.

BELL, Circuit Judge (dissenting).

I dissent. I would support the view of the District Judge that the time remaining before the opening of school in September is insufficient to make the change from a segregated to a desegregated school system as requested.

The chance of disruption of the educational process in Mobile likely to be encountered in planning and effecting the necessary changes on such short notice outweighs the damage which may be incurred by Plaintiffs in waiting another year. Thus, I would not hold that the District Judge abused his discretion. The loss of the year can be made up by requiring that two grades be desegregated beginning in 1964. I would join in the order if it encompassed this change.

Time for the effectuation of orderly school management procedures is essential, and we should be careful not to give rise to an untoward situation in school administration at this late hour. Registration for the upcoming term has been completed, and school officials and staffs are in the vacation season. This is particularly so where we are passing on a motion in a case not filed until March, 1963.

On Petition for Rehearing

PER CURIAM.

This matter is before the Court on the petitioners' application for a rehearing.

July 9, 1963, this Court by mandate directed the District Court to enter an injunction and order requiring the Board of Commissioners of Mobile County to submit to the District Court by August 1, 1963, a step-ladder plan for desegregating the public schools in Mobile, starting with the first grade in September 1963. Three days later, another panel of the Court decided Armstrong v. Board of Education of the City of Birmingham, No. 20595, 5 Cir., — F.2d —. In that case the Court declined to issue an injunction pending appeal which would go so far as to provide "when and how the complete desegregation of the public schools may be accomplished." The Court's mandate requires the Birmingham School Board to submit by August 19, 1963, a plan for an immediate start in desegregation by applying the Alabama Pupil Placement Law to all school grades.

At this initial stage in the travail of desegregating the public schools in Alabama, the School Boards of Mobile and Birmingham face substantially the same social, legal, and administrative difficulties. We express no opinion of the merits of uniformity in school desegregation as against a school board's tailoring a plan and a trial judge's shaping a decree, to it a particular school system. But we have reached the conclusion that at this early point in the legal proceedings, at a time when no school board in Alabama has formulated any plan for desegregation, there should not be one law for Birmingham and another for Mobile. We have decided therefore to conform the Mobile order to the Birmingham order.

Accordingly, the Court amends the judgment and order of July 9, 1963, issued as the mandate, by deleting the following paragraph:

> "It is further ordered, adjudged and decreed that said persons be and they are hereby required to make an immediate start in the desegregation of the school of Mobile County, and that a plan be submitted to the District Court by August 1, 1963, which shall include a statement that the maintenance of separate schools for the Negro and white children of Mobile County shall be completely ended with respect to the first grade during the school year commencing

> September 1963, and with respect to at least one successively higher additional grade each school year thereafter."

and, in lieu thereof, directs the District Court for the Southern District of Alabama to enter the following paragraph as its judgment and order:

> "It is further ordered, adjudged and decreed that said persons be and they are hereby required to submit to this Court not later than August 19, 1963, a plan under which the said defendants propose to make an immediate start in the desegregation of the schools of Mobile County, Alabama, which plan shall effectively provide for the carrying into effect not later than the beginning of the school year commencing September 1963 and thereafter of the Alabama Pupil Placement Law as to all school grades without racial discrimination, including 'the admission of new pupils entering the first grade, or coming into the County for the first time, on a nonracial basis.' Augustus v. Board of Public Instruction, 5 Cir., 1962, 306 F.2d 862, 869 (that opinion describes such a plan which has been approved and is operating in Pensacola, Florida)."

As in the Birmingham decision, the order contemplates a full hearing before the District Court. The District Court will therefore go forward with the trial already fixed for November 14, 1963.

Except to the extent expressly granted herein, the petitioners' application for a rehearing is denied.

The Clerk is directed to issue the mandate, as amended, forthwith.

Bell, Circuit Judge (concurring in part and dissenting in part).

The modification by the majority of their prior order in this case compounds error. Of course, I agree to the modification to the extent that it may alleviate disruption of the educational process in Mobile during the 1963-1964 school term.

My understanding of this latest order is not altogether clear. It appears to simply require activation, under some plan yet to be worked out, of the Alabama School Placement Law which was adopted by the Legislature of that State in 1957, and which was approved as constitutional on its face in Shuttleworth [sic] v. Birmingham Board of Education, N.D.Ala., 1958, 162 F.Supp. 372, affirmed 358 U.S. 101, 79 S.Ct. 221, 3 L.Ed.2d 145. It is not likely that any appreciable amount of desegregation will take place under that law at this late date. The protective measures assured by Judge Lynne in the Armstrong case of a hearing on complaints if and where the plan or law is administered on the basis of race on five days notice is not present in Mobile. It is an inherently complicated law providing many factors which may be considered in making pupil assignments. We have only recently eliminated two of them in the Atlanta school case where we said that the use of scholastic standards and personality interviews as a basis in transfer and assignment were illegal per se when applied only to Negroes. Calhoun v. Latimer, 5 Cir., 1963, 321 F.2d 302. Others were eliminated or limited when that case was in the District Court. Calhoun v. Board of Education, N.D.Ga., 188 F.Supp. 401. Working out a meaningful plan will not be easy, and will require more than the cursory and perfunctory treatment the case has received here.

Moreover, what was done in Birmingham may or may not be relevant to Mobile. The case there had been pending in the District Court some three years. The District Court conducted a hearing and had certain representations from the school board as to how the Pupil Placement Law would be administered. Here no party has ever mentioned using this law. The District Court has never considered it.

This case is set for trial on the merits in November. A pending motion to dismiss is set at the same time. The District Court has ordered the school board to propose at that time a plan for desegregation of the school system beginning in September 1964 within the teachings of the Supreme Court decisions on that subject.

It has been the position of appellants that their ultimate right to a desegregated school system is cast in doubt by the pending motion to dismiss, and the fact that the case is set for trial on the merits even though the school system is now segregated. One of the real thrusts of the appeal is their contention that they cannot be certain that desegregation will become a reality in the school term commencing in September 1964 because of this posture of the case. An order of the type originally entered but making desegregation effective with the beginning of school in September 1964, and in at least two grades, should serve to dispel this doubt and the record warrants such an order. In [sic] warrants nothing more. The school board would have the opportunity in the interim of formulating a desegregation plan, subject to court approval, and making ready for the good faith adaptation of the plan.

The modification has been neither sought nor considered and will come as a great surprise to all. It will in all probability be ineffective. I do not understand the inordinate hurry in this case. It has only been pending three and one half months. It has been to this court twice in that short time.

Probably no party will consider the relief granted or denied to be a victory, but what has been done is at the expense of the judicial process. A Court of Appeals should not sit as a District Court in chancery to mold and enter an equitable decree affecting an entire school system in a metropolitan community without hearing from the parties on the nature of the decree, and without facts before it to serve as a basis for the decree. The All-Writs Statute, 28 U.S.C.A., § 1651, does not authorize this. It must contemplate rules of procedure, notice, record facts, and an opportunity to be heard, all after time for consideration by the District Court. It applies only in cases of emergency proportions. To state this belief is to at once demonstrate that I cannot join in the procedure here. Therefore, I must dissent; except as otherwise stated, with the admonition that more constitutional rights will be lost than gained in the long run by departure from procedures which have stood the test of time, and which are a part of due process of law as we have heretofore known it. In fact, more may be eventually lost in this very case.

While this appeal must have been considered as presenting something in the nature of a judicial emergency in the beginning; otherwise it would not have been twice advanced over the many other cases pending in this court, it is plain to me that it now has no emergency proportions. I would remand it to the District Court for action on the basis of reasoned and informed discretion in the light of necessary facts and argument, consistent with the law in the premises and the guidelines which I have set out regarding September 1964.

Cameron, Circuit Judge (dissenting).

On July 11, 1963, I requested a hearing of this case en banc by writing all of the Judges of the Court in active service as follows:

> "Pursuant to Rule 25(a) of this Court, I hereby initiate consideration by each of the Circuit Judges in active service of whether to order a hearing or rehearing of this case en banc. Included in this motion is the request that the issuance of the mandate be stayed until the attitude of the members of the Court can be ascertained and that the Chief Judge proceed to poll the Court on this motion.

"I am of the opinion * * * that the case was not legally advanced for hearing or placed on the docket for hearing at the time it was heard, it being my understanding that the order was signed by Judge Tuttle on June 28th after the judgment of the district court had been entered June 24th.

"I think, too, that there is considerable doubt about the jurisdiction of this panel to hear the case. It is my understanding that this panel had under consideration before we adjourned for the summer the Theron Lynd case * * * Its right to consider and adjudicate the Davis case is, I think, subject to serious question.

"I assume that the record before the Court in New Orleans was sent up under our Rule 23(4), which is a substantial rescript of Rule 75(j), Federal Rules of Civil Procedure. That portion of our Rules refers only to a motion 'for any intermediate order.' I do not think the order which this Court directed the district court to enter can be classified as an intermediate order. It seems to me it is the equivalent of a final judgment granting all of the relief which the plaintiffs-appellants would be entitled to under a hearing on the merits and, in fact, dispenses with a hearing on the merits.

"For these reasons and others, including the fact that I see from the press that the appellees have made or intend to make a motion for a hearing en banc, I respectfully make this request."

The panel of Judges Brown, Wisdom, and Bell filed two per curiam opinions, one dated July 9, 1963 in which Judge Bell dissented, and the second filed July 18, 1963 in which Judge Bell concurred in part and dissented in part.

Being advised that a majority of the members of this Court in active service did not support my request for en banc hearing, I respectfully dissent from the action of the members of the Court in refusing to grant an en banc hearing. The principles discussed in my dissenting opinion in No. 20595, Armstrong et al. v. Board of Education of the City of Birmingham, et al., 5 Cir., — F.2d —, are in my judgment controlling in this case also and I adopt that opinion as a part of this one.

The panel to which this case was assigned by the Chief Judge on July 1, 1963[1] was a panel designated for a former term of this Court. Assuming that it was empowered to act, during the intervening time, on a case which it had under consideration when the term ended, it would not, in my opinion, have jurisdiction to hear the present case under special designation by the Chief Judge acting alone. As stated in the Armstrong case, it seems to me clear from the statutes and the Supreme Court decisions cited there and the Rules of this Court, that the assignment of Judges and of cases for hearing is a matter entrusted solely to the Court as a body.

To hold that one Judge is vested with authority to fix the time and place where a case is to be heard, and to select the Judges who shall hear it, is in my judgment, to decide that one man has power in excess of any which has been committed to any individual under this government of laws.

It is clear, moreover, that there is no showing here that the case is exceptional or extreme or which demonstrates a clear abuse of discretion or usurpation of judicial power such as the panel of this Court thought it discovered in Stell et al. v. Savannah-Chatham County Board of Education et al., May 24, 1963, 318 F.2d 425.

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[1] "The within motion for an injunction pending appeal is hereby set for hearing before a panel of this Court to be convened in New Orleans, Louisiana, July 8, 1963, to follow immediately after the hearing in the case of United States v. Lynd, 5 Cir., 321 F.2d 26.

"This 28th day of June, 1963.

"Elbert P. Tuttle
"Chief Judge
"Fifth Circuit"

I respectfully dissent.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

July 12, 1963

No. 20595

Dwight Armstrong, Denise Armstrong, James Armstrong, Jr., Floyd Armstrong, Minors, by James Armstrong, Sr., their father and next friend, et al., *Appellants*,

v.

The Board of Education of the City of Birmingham, Jefferson County, Alabama, the Present Members of the said Board and Theo R. Wright, Superintendent of Schools, City of Birmingham, Alabama, *Appellees*.

Rehearing Denied En Banc July 22, 1963.

Dissenting Opinion July 30, 1963.

On Petition for Intervention and Stay September 6, 1963.

W. L. Williams, Jr., Birmingham, Ala., Ernest D. Jackson, Sr., Jacksonville, Fla.; Constance Baker Motley, New York City, for appellants.

Jos. F. Johnston, Reid B. Barnes, Birmingham, Ala., for appellees.

Before Tuttle, Chief Judge, and Rives and Gewin, Circuit Judges.

Rives, Circuit Judge.

The submission is upon the appellants' motion for an injunction pending appeal from the following judgment entered on the 28th day of May 1963:

> "In conformity with the memorandum opinion of the court contemporaneously entered herein, it is ORDERED, ADJUDGED and DECREED by the court that the injunctive relief for which plaintiffs pray in their own behalf and in behalf of others similarly situated be and the same is hereby denied.
>
> "It is further ORDERED, ADJUDGED and DECREED by the court that judisdiction of this action is hereby retained for the purpose of permitting the filing of such supplemental complaint, if any, as might be entitled to be presented, in case of any unconstitutional application of the Alabama School Placement Law against the plaintiffs, or others similarly situated, or of any other unconstitutional action on the part of defendants against them. It is further ORDERED, ADJUDGED and DECREED by the court that the issues tendered by any supplemental complaint will be given a preferred setting on the docket of this court and will be heard on five days' notice to defendants."

The opinion of the court stated that:

> "This court will not sanction discrimination by them [the Superintendent and Board of Education] in the name of the placement law but it is unwilling to grant injunctive relief until their good faith has been tested. If it should be demonstrated that it has been unconstitutionally applied, under the settled authorities the court would be compelled to order the submission of a desegregation plan for its approval."

The district court affirmed that both the Superintendent and the Board had assured the court that regulations governing the *assignment* and *transfer* of pupils in the Birmingham school system had been in effect since June 1958 for the purpose of implementing the Alabama law; and found that sufficient time remained before the opening of school in September 1963 for the processing of applications for *assignments* and *transfers* in behalf of interested individuals.

The opinion further stated that after application for *assignment* or *transfer* was made by a pupil, or those authorized to act in his behalf, to the school board, judicial remedies for the denial of constitutional rights could be *pursued at once* in the United States District Court without pursuing state court remedies.

The opinion continued:

> "Jurisdiction of this action will be retained for the purpose of permitting the filing of such supplemental complaint, if any, as might be entitled to be presented, in case of any unconstitutional application of the Alabama School Placement Law against the plaintiffs, or others similarly situated, or of any other unconstitutional action on the part of defendants against them. The issues tendered by any supplemental complaint will be given a preferred setting on the docket of this court and will be heard on five days notice to defendants."

The district court further mentioned the fact that the Superintendent and the Board had assured the court that "* * * they stand ready to comply with the law when any individual sets the administrative machinery in motion." By affidavit of the Superintendent speaking on behalf of the Board filed in this Court, it is stated:

> "It [the Board] was and is now prepared to deal with the matter in a proper and orderly manner upon applications pursuant to the laws of Alabama and the decree of the District Court in this case."

In the course of its opinion the district court stated: "Before this court may grant injunctive relief, the administrative remedies provided therein [in the Alabama School Placement Law] must first have been exhausted."

That ruling was directly contrary to repeated decisions of this Court. See, among others, Gibson v. Board of Public Instruction of Dade County, 5 Cir. 1957, 246 F.2d 913, 914;[1] on second appeal, 5 Cir. 1959, 272 F.2d 763, 767;[2] Holland v. Board of Public Instruction of Palm Beach

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[1] "The appellees urge also that the judgment should be affirmed because the plaintiffs have not exhausted their administrative remedies under the Florida Pupil Assignment Law of 1956, Chapter 31380, Laws of Florida, Second Extraordinary Session 1956, F.S.A. § 230.231 [230.232]. Neither that nor any other law can justify a violation of the Constitution of the United States by the requirement of racial segregation in the public schools. So long as that requirement continues throughout the public school system of Dade County, it would be premature to consider the effect of the Florida laws as to the assignment of pupils to particular schools." Gibson v. Board of Public Instruction of Dade County, 5 Cir. 1957, 246 F.2d 913, 914-915.

[2] "On the first appeal in this case, we said that so long as the requirement of racial segregation continues throughout the public school system it is premature to consider the effect of the law providing for the assignment of pupils to particular schools. See 246 F.2d at pages 914, 915. Obviously, unless some legally nonsegregated schools are provided, there can be no constitutional assignment of a pupil to a particular school. We do not understand that the Fourth Circuit has ruled to the contrary.[5] The net effect of its rulings, as we understand them, is that the desegregation of the public schools may occur simultaneously with and be accomplished by the good faith application of the law providing for the assignment of pupils to particular schools. If that understanding is correct, then we readily agree.

> "[5] See Carson v. Warlick, 4 Cir., 1956, 238 F.2d 724; Covington v. Edwards, 4 Cir., 1959, 264 F.2d 780; Holt v. Raleigh City Board of Education, 4 Cir., 1959, 265 F.2d 95; Allen v. County School Board of Prince Edward County, Va., 4 Cir., 1959, 266 F.2d 507."

Gibson v. Board of Public Instruction, Dade County, Fla., 5 Cir. 1959, 272 F.2d 763, 767.

County, Fla., 5 Cir. 1958, 258 F.2d 730, 732.[3] Mannings v. Board of Public Instruction, 5 Cir. 1960, 277 F.2d 370, 372, 373; Augustus v. Board of Public Instruction, 5 Cir. 1962, 306 F.2d 862, 869; Bush v. Orleans Parish School Board, 5 Cir. 1962, 308 F.2d 491, 499-501.[4] The district court chose, instead, to rely upon a line of decisions from the Fourth Circuit,[5] which, according to the district court, "continued to apply the doctrine of exhaustion of administrative remedies fairly and lawfully conducted." In Gibson v. Board of Public Instruction, supra, 272 F.2d 763, 767, n. 5, we noted many of the same Fourth Circuit decisions and stated our understanding that they were not contrary to the decisions of this Fifth Circuit. In any event, on June 3, 1963, shortly after the district court's decision, the Supreme Court of the United States put beyond debate the proposition that, in a school desegregation case, it is not necessary to exhaust state administrative remedies before seeking relief in the federal courts:

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[3] "A three-judge district court recently held that the Alabama School Placement Law is not unconstitutional *on its face*, but concluded that ruling with a clear note of warning:

> " 'All that has been said in this present opinion must be limited to the constitutionality of the law *upon its face*. The School Placement law furnishes the legal machinery for an orderly administration of the public schools in a constitutional manner by the admission of qualified pupils upon a basis of individual merit without regard to their race or color. We must presume that it will be so administered. If not, in some future proceeding it is possible that it may be declared unconstitutional in its application. The responsibility rests primarily upon the local school boards, but ultimately upon all of the people of the State.'

Nothing said in that opinion conflicts in any way with this Court's earlier statement relative to the Florida Pupil Assignment Law:

> " '* * * Neither that nor any other law can justify a violation of the Constitution of the United States by the requirement of racial segregation in the public schools.' Gibson v. Board of Public Instruction of Dade County, 5 Cir., 1957, 246 F.2d 913, 914." .

Holland v. Board of Public Instruction, 5 Cir. 1958, 258 F.2d 730, 732.

[4] "This Court, like both Judge Wright and Judge Ellis, condemns the Pupil Placement Act when, with a fanfare of trumpets, it is hailed as the instrument for carrying out a desegregation plan while all the time the entire public knows that in fact it is being used to maintain segregation by allowing a little token desegregation. When the Act is appropriately applied, to individuals as individuals, regardless of race, it has no necessary relation to desegregation at all." Bush v. Orleans Parish School Board, 5 Cir. 1962, 308 F.2d 491, 499.

> "We have previously indicated that relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy. We stated in Monroe v. Pape, 365 U.S. 167, 183, 81 S.Ct. 473, 482, 5 L.Ed.2d 492:
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> > "'It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.'
>
> "The cause of action alleged here is pleaded in terms of 42 U.S.C. § 1983 * * *.
>
> "That is the statute that was involved in Monroe v. Pape, supra; and we reviewed its history at length in that case. 365 U.S. 171 et seq., 81 S.Ct. 473, 5 L.Ed.2d 492. The purposes were several fold—to override certain kinds of state laws, to provide a

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[5] The district court cited Covington v. Edwards, 4 Cir. 1959, 264 F.2d 780; Holt v. Raleigh City Board of Education, 4 Cir. 1959, 265 F.2d 95; McCoy v. Greensboro City Board of Education, 4 Cir. 1960, 283 F.2d 667; Jeffers v. Whitley, 4 Cir. 1962, 309 F.2d 621; Wheeler v. Durham City Board of Education, 4 Cir. 1962, 309 F.2d 630.

> remedy where state law was inadequate, 'to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice' (id., 174, 81 S.Ct. 477), and to provide a remedy in the federal courts supplementary to any remedy any State might have. Id., 180-183, 81 S.Ct. 480-482.'
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> * * * * * * * * *
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> "* * * The right alleged is as plainly federal in origin and nature as those vindicated in Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873. Nor is the federal right in any way entangled in a skein of state law that must be untangled before the federal case can proceed. For petitioners assert that respondents have been and are depriving them of rights protected by the Fourteenth Amendment. It is immaterial whether respondents' conduct is legal or illegal as a matter of state law. Monroe v. Pape, supra, 365 U.S., 171-187, 81 S.Ct. 475-484. Such claims are entitled to be adjudicated in the federal courts. Monroe v. Pape, supra, 365 U.S. at 183, 81 S.Ct. at 481; Gayle v. Browder, 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114, affirming 142 F. Supp. 707; Borders v. Rippy, 5 Cir., 247 F.2d 268, 271. Cf., e. g., Lane v. Wilson, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281; Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987; Schnell v. Davis, 336 U.S. 933, 69 S.Ct. 749, 93 L.Ed. 1093 affirming 81 F.Supp. 872; Turner v. City of Memphis, 369 U.S. 350, 82 S.Ct. 805, 7 L.Ed. 2d 762."

McNeese v. Board of Education for Community Unit School District 187, 83 S.Ct. 1433.[6]

The district court's opinion referred to the reluctance of any Negro child "to take the initiative in bringing about the integration of the public schools." The burden of initiating desegregation does not rest on Negro children or parents or on whites, but on the School Board. As said in Brown v. Board of Education, 1955, 349 U.S. 294; 299, 75 S.Ct. 753, 756, 99 L.Ed. 1083:

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[6] As the district court recognized in its opinion, the present action also proceeds under 42 U.S.C.A. §1983.

> "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles."

The long-standing order of responsibility is "first the school authorities, then the local district court, and lastly the appellate courts." Rippy v. Borders, 5 Cir. 1957, 250 F.2d 690, 693.

Further, as we said recently in speaking of the Atlanta public schools:

> "Our decision must also be rendered upon a consideration of the most recent pronouncements of the Supreme Court, Goss v. Board of Education of City of Knoxville, Tenn., supra [83 S.Ct. 1405], and Watson v. City of Memphis, 373 U.S. 526, 83 S.Ct. 1314, 10 L.Ed.2d 529, which make it plain that the time available for the transition from segregated to desegregated school systems is, with the passage of years since the Brown decisions, becoming more sharply limited. Indeed, we so stated in an opinion theretofore rendered on May 24, 1963. Davis v. Board of School Commissioners of Mobile County, 5 Cir., 318 F.2d 63."

Calhoun v. Latimer, 5 Cir., — F.2d —.

In the light of the foregoing well-established principles of law, we go to the undisputed facts as found by the district court:

> "The white population of Birmingham is 205,620; the negro, 135,627. There are 8 high schools designated 'White' with 409 teachers and 10,081 pupils; 5 high schools designated 'Negro' with 278 teachers and 6,748 pupils; 50 elementary schools designated 'White' with 781 teachers and 29,578 pupils; 42 elementary schools designated 'Negro' with 697 teachers and 26,967 pupils. Never at any time has a negro pupil been assigned or transferred to a school designated 'White' or a white pupil to a school designated 'Negro.' Without exception white instructional personnel have been assigned only to schools designated 'White' and negro instructional personnel only to schools designated 'Negro.' White schools are located with reference to the concentration of white population and negro schools with reference to the concentration of negro population. There are overlappings in the geographical areas involved wherein there are white schools in closer proximity to the residences of negro pupils than negro schools. The reverse situation obtains with respects to white pupils. Notwithstanding, the custom, usage and practice historically followed, sanctioned and expected by Superintendent and Board to be followed presently, result in white pupils attending white schools and negro pupils negro schools.
>
> "To summarize, it graphically appears from the testimony of Dr. Theo R. Wright, Superintendent of Birmingham Public Schools, that he and the Birmingham Board of Education have operated a segregated school system based upon race in the past, are doing so now, and have formulated no plans to discontinue such an operation."

This litigation has now been pending for more than three years. There must, at the very minimum, be a good faith start toward according the plaintiffs and the members of the class represented by them their constitutional rights so long delayed. However, whether the delay which has already occurred is justified or not, it cannot be compensated by hasty or precipitate action under the order of this Court. Our action must be dictated by the concept of "deliberate speed" to the extent of not causing undue or unnecessary confusion in the administration of the Birmingham public schools to the injury of all of the pupils, white and black. In the case of the Pensacola, Florida, School System, we said on July 24, 1962, about a year ago: "It is probably too late, without undue confusion, to require the elimination as to any grade of such dual districts in time for the 1962 fall term." Augustus v. Board of Public Instruction, 5 Cir. 1962, 306 F.2d 862, 869. This same thought now holds true as to the Birmingham public schools.[7]

We decline, therefore, to issue an injunction pending appeal which would go so far as to provide that the maintenance of separate schools for the Negro and white children of Birmingham shall be completely ended with respect to any grade, or when and how the complete desegregation of the public schools may be accomplished. Such matters can be more appropriately determined upon a hearing of this appeal on its merits when a full record will be available. It affirmatively appears at this time, however, on the face of the opinion and judgment of the district court, that the plaintiffs and the members of the class represented by them are entitled to more than mere expressions of opinion and have a right to a judgment legally enforcing the desegregation measures on which the Board has virtually agreed.

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[7] Superintendent of Schools of the City of Birmingham, Theo R. Wright, testified by affidavit upon the present motion at some length, concluding: "* * * the attempted desegregation of any one grade in the system at the commencement of the fall term this year would be greatly disruptive of the whole school system, and extremely impracticable and injurious, if not impossible, for the reasons stated herein and in other affidavits of affiant." There was no controverting testimony.

In line with the procedure which we followed as to the Savannah, Georgia, schools in Stell, et al. v. Savannah-Chatham County Board of Education, et al., 5 Cir., No. 20557, 318 F.2d 425, it is therefore ORDERED that the District Court for the Northern District of Alabama enter the following judgment and order:

> "The defendants, The Board of Education of the City of Birmingham, Jefferson County, Alabama, the present members of said Board (naming them specifically) and Theo R. Wright, Superintendent of Schools, City of Birmingham, and their agents, servants, employees, successors in office and those in concert with them who shall receive notice of this order, be and they are hereby restrained and enjoined from requiring segregation of the races in any school under their supervision, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially nondiscriminatory basis with all deliberate speed, as required by the Supreme Court in Brown v. Board of Education of Topeka, 349 U.S. 294 [75 S.Ct. 753, 99 L.Ed. 1083].
>
> "It is further ordered, adjudged and decreed that said persons be and they are hereby required to submit to this Court not later than August 19, 1963, a plan under which the said defendants propose to make an immediate start in the desegregation of the schools of Birmingham, Jefferson County, Alabama, which plan shall effectively provide for the carrying into effect not later than the beginning of the school year commencing September 1963 and thereafter of the Alabama Pupil Placement Law as to all school grades

> without racial discrimination, including 'the admission of new pupils entering the first grade, or coming into the County for the first time, on a nonracial basis,' Augustus v. Board of Public Instruction, 5 Cir. 1962, 306 F.2d 862, 869 (that opinion describes such a plan which has been approved and is operating in Pensacola, Florida)."

Nothing contained in this opinion or in the order directed to be issued by the district court is intended to mean that voluntary segregation is unlawful; or that the same is not legally permissible.

This order shall remain in effect until the final determination of the appeal of the above-styled case in the Court of Appeals for the Fifth Circuit on the merits, and until the further order of this Court. During the pendency of this order the district court is further directed to enter such other and further orders as may be appropriate or necessary in carrying out the expressed terms of this order.

In view of the already long delay, it is ordered that the mandate issue forthwith.

Motion granted.

TUTTLE, Chief Judge (concurring specially).

I, of course, join Judge Rives in the action taken on the appellants' motion for injunction pending appeal, and I join him in the order that is embodied in his opinion. I agree wholeheartedly with all that is said in his opinion, except as it bears on the relief that is to be granted in September, 1963.

It is now, as it has been from the start, the duty of the Board of Education to assume the primary responsibility putting an end to racially segregated schools. Brown v. Board of Education of Topeka (1955) 349 U.S. 294, 299, 75 S.Ct. 753, 99 L.Ed. 1083. In a situation where such a board of education has completely failed to make such a start, and, fortuitously or otherwise, the first appealable order entered by a district court comes so late in the school year that the Board then attempts to say it is too late to do anything by the following school year, I think it is the duty of an appellate court to require a maximum effort by the Board to do what the law clearly requires of it, rather than to accept as a substitute for performance a plea that the Board has not made necessary preparation to permit orderly transition by the opening of the fall term of school.

I believe it would not be consistent with what this Court has previously required in other situations if I did not express the view, strongly held by me, that as a minimum the Board of Education of the City of Birmingham should be required by an injunction of the trial court to arrange that at least one grade of the public schools of that city be completely desegregated by the abolition of dual school zones pending the appeal of this case on the merits in this Court. See Stell v. Savannah-Chatham County Board of Education, et al., 5th Cir. No. 20557, 318 F.2d 425 and see Davis et al. v. Board of School Commissioners of Mobile County et al., 5th Cir., 322 F.2d 356. Since, however, a majority of the court does not require this relief, I join in the order as written by my esteemed colleague, Judge Rives.

GEWIN, Circuit Judge (dissenting).

My brothers of the majority have spoken in such inaccurate and disapproving terms with reference to the opinion and order of the distinguished trial judge of the Northern District of Alabama who tried this case for several days, that I find it not only impossible to agree with them, but also necessary to write this dissent in order to inform those who may be interested of my opinion of the actual holding of the District Court. The cases cited by the majority condemn the opinion written by them. The opinion and order of the District Court considered together as they should be, destroy every reason asserted in the majority opinion for for the unusual action taken in the circumstances of this case by the *issuance of an injunction pending appeal* on the merits.

It should be noted quickly that the majority opinion leaves little to be decided when the case reaches this court on the merits. Under the guise of "injunction pending appeal" that opinion substantially decides the case and renders moot many questions which could arise when the case reaches the court for final decision after a review of the record. It is recognized that injunctions pending appeal may be used in *exceptional* and *extreme* cases where there is a *clear abuse of discretion* or *usurpation of judicial power.* Such extreme, harsh and unusual action should never be taken as a substitute for a proper decision on the merits. The action in this case is taken without any pretense that the court has taken so much as a hurried glance at the record. There has not been sufficient time for the record to reach the court. In effect my brothers of the majority have concluded that this is an *extreme and exceptional* case, involving either an abuse of discretion or usurpation of judicial power. Accordingly, they have ordered the District Court to issue a "judgment and order" enjoining the Superintendent and Board of Education of Birmingham, and have directed "* * * that the mandate issue forthwith." This drastic action has been taken within a few days following the submission of the case on the motion for injunction—not on the merits. As late as June 3, 1963, the Supreme Court stated in Goss v. The Board of Education of the City of Knoxville, Tenn., 373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed.2d 632, a school segregation case, a recognition of:

> "* * * the multifarious local difficulties and 'variety of obstacles' which might arise in this transition * * *."

and the court further stated:

> "In reaching this result we are not unmindful of the deep-rooted problems involved."

In the instant case, this court has not even had the opportunity to review the evidence which was before the trial judge for the purpose of considering any "variety of obstacles" or "deep-rooted problems" which may be involved. This court does not have sufficient facts before it, in the absence of the record, to render a decision "guided by equitable principles" and "characterized by a practical flexibility in shaping its remedies" and to exercise the requisite facility "for adjusting and reconciling public and private needs."[1]

I. THE OPINION AND ORDER OF THE DISTRICT COURT

The majority opinion quotes certain excerpts from the opinion of the court below, but the excerpts quoted do not fairly represent the opinion of that court. The action of the District Court in its memorandum opinion and order may be summarized in outline form as follows:

(a) The District Court stated that the "starting point in any school segregation case must be Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), the implementing decree of the court in Brown v. Board of Education, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955), and its reinterpretative opinion, Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5, 19, (1958)", and recognized that it was bound by the holdings in the cases cited.

(b) Proper notice was taken of the fact that "* * * district courts have been invested with and are expected honestly and fairly to exercise discretion in the enormous task of desegregating public schools." The opinion asserts that the course to be followed in the discharge of such task was "staked out" in an opinion written by Judge Rives in the case of Shuttlesworth v. Birmingham Board of Education, 162 F.Supp. 372 (N.D. Ala. 1958) aff'd. by Supreme Court 358 U.S. 101, 79 S.Ct. 221, 3 L.Ed.2d 145, wherein it is unequivocally held:

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[1] See Brown v. Board of Education of Topeka, 349 U.S. 294, 75 S. Ct. 753.

> "All that has been said in this present opinion must be limited to the constitutionality of the law *upon its face*. The School Placement Law furnishes the legal machinery for an orderly administration of the public schools in a constitutional manner by the admission of qualified pupils under a basis of individual merit without regard to their race or color. We must presume that it will be so administered. If not, in some future proceeding it is possible that it may be declared unconstitutional in its application. The responsibility rests primarily upon the local school boards, but ultimately upon all of the people of the State."

(c) Expressly stating that the law of this case is that the Alabama School Placement Law "* * * furnishes the legal machinery for an orderly administration of the public schools in a constitutional manner by the admission of qualified pupils upon a basis of individual merit without regard to their race or color,' he court held that the pupil, or those authorized to act in the pupil's behalf, should first apply for *assignment* or *transfer*; and that before the court would grant *injunctive relief*. the administrative remedies provided by the Alabama act *as modified and limited by the Court's opinion and order* must first be used.

(d) The opinion clearly holds that after application for *assignment* or *transfer* is made by a pupil, or those authorized to act in his behalf, to the school board, judicial remedies for the denial of Constitutional rights can then be *pursued at once* in the United States District Court without pursuing state court remedies. The court observed the fact that this Court of Appeals has been alert to strike down deviations by district courts from the Constitutional principles laid down in the Brown case, and asserted that the court had carefully read and considered all of the decisions by this Court of Appeals relative to the subject.

(e) The District Court correctly concluded that this Court of Appeals[2] has not heretofore had cause to consider whether the Alabama law has a permissible scope of operation in the desegregation of public schools, but it was noted that the Fourth Circuit had dealt with a similar state act in the case of Carson v. Warlick, 238 F.2d 724 (4 Cir. 1956), which was cited with approval in the Shuttlesworth case.

(f) The opinion and order squarely state that discrimination will not be tolerated, and uses the following language in so holding:

> "This court will not sanction discrimination by them [the Superintendent and Board of Education] in the name of the placement law but it is unwilling to grant injunctive relief until their good faith has been tested. If it should be demonstrated that it has been unconstitutionally applied, under the settled authorities the court would be compelled to order the submission of a desegregation plan for its approval."

The District Court affirmed that both the Superintendent and the Board had assured the Court that regulations governing the *assignment* and *transfer* of pupils in the Birmingham school system had been in effect since June 1958 for the purpose of implementing the Alabama law: and found that sufficient time remained before the opening of school in September 1963 for the processing of applications for *assignments and transfers* in behalf of interested individuals.

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[2] The Shuttlesworth case was decided by a three judge District Court and not by this court. The Shuttlesworth case was affirmed by the Supreme Court.

(g) Jurisdiction of the action was retained for the purpose of hearing any complaint which might be presented "* * * in case of any unconstitutional application of the Alabama School Placement Law against the plaintiffs, or others similarly situated, or of any other unconstitutional action on the part of defendants against them." The trial court mentioned the fact that the Superintendent and the Board had assured the court that "* * * they stand ready to comply with the law when any individual sets the administrative machinery in motion." By affidavit of the Superintendent speaking on behalf of the Board filed in this court, it is stated:

> "It [the Board] was and is now prepared to deal with the matter in a proper and orderly manner upon applications pursuant to the laws of Alabama and the decree of the District Court in this case."

(h) In case any complaint is made by any person, the issues tendered thereby are to be given "* * * a preferred setting on the docket of this court and will be heard on five days notice to defendants."

It is my considered opinion that the action of the District Court fully complies with both Brown decisions, the decision in the Aaron case, and is in complete accord with the previous holdings of this court. The trial court found as a fact that according to the uncontroverted record before the court, that no Negro child, or anyone authorized to act in his behalf, had applied for *enrollment in or transfer to* any school designated White, and pursued the remedies afforded by the Alabama statute. It was further found as a fact that such reluctance to bring about integration of the public schools was not a "blind adherence to tradition", but that the undisputed evidence in the record (which this court has not yet seen) clearly shows that there is "very strong opposition to the mixing of the races in the schools of Birmingham on the part of citizens of all races." The District Court rejected forthwith the opinio of experts in the fields of psychology and anthropology in whatever form insofar as they constitute an attack upon the rules of law laid down by the Supreme Court in the Brown and Aaron decisions.

A casual analysis of the opinion and judgment of the District Court should convince anyone that the court has not followed the Alabama act blindly, but has used it only insofar as it "furnishes the legal machinery" for the desegregation of the schools in a Constitutional manner. The *asignment and transfer* of students from school to school, and the *right to make objection* to an assignment already made were covered by the opinion. In their brief, the Superintendent and Board admit and affirmatively assert that the provisions of the Alabama act and the decree of the court "are not restricted in application to any grade or grades * * *"; that it "* * * authorizes 'application' for initial assignment to any school by the entering first grade students"; and that there is "* * * no limitation on the number of pupils who may apply for assignment or transfer. In my opinion, the plan outlined by the District Court not only meets the standards recently expressed by this court in the case of Calhoun v. Latimer, 5 Cir., 321 F.2d 302, but makes more liberal provisions with respect to assignment, transfer and objection to assignments previously made, because such provisions are applicable to all grades in Birmingham.

A fair and proper analysis of the ruling of the District Court will reveal that it is not subject to the criticism that students cannot make application for assignment to a school of their choice on entering the first grade as denounced in Bush v. Orleans Parish School Board, 308 F.2d 491, 5 Cir. 1962. Such applicants for assignment or transfer are not impeded by dual school districts as was involved in Augustus v. Board of Pub. Inst. of Escambia Co., 306 F.2d 862, 5 Cir., 1962; the plaintiffs are not required to comply with the details of the Alabama Placement Law as condemned in Mannings v. Board of Pub.

Inst. of Hillsborough Co., Fla., 277 F.2d 370, 5 Cir. 1960; nor is there a failure to afford a reasonable and conscious opportunity to pupils to apply for admission to any school to which they are eligible as condemned in Gibson v. Board of Pub. Inst. of Dade Co., Fla., 272 F.2d 763, 5 Cir. 1958. It is true that the Brown decision places first responsibility to desegregate on the school authorities; but if the school authorities do not act, the district courts are required to act. Admittedly, the school authorities in Birmingham have not submitted a plan of desegregation. Their failure resulted in this lawsuit, and the District Court has now directed the authorities to proceed with desegregation as provided by the Alabama law and the decree of the District Court. By retaining jurisdiction of the case and ordering that any complaint will be heard on five days' notice, the District court has provided an effective and speedy method of supervision. We know of no plan or other remedy which is calculated to give better relief. The failure of the school authorities to act does not require injunctive relief in cases where a method of desegregation is outlined and provided as was done in this case. Plans presented by school boards are rarely ever approved in toto. Even after plans are submitted by school authorities and revised by the courts, litigation seems to continue.

II. THE MAJORITY OPINION

(a) Injunction Pending Appeal:

There is an ancient and classic principle long recognized by all courts with reference to the granting of injunctions whether at the trial or appellate level, forcefully stated by Justice Baldwin, sitting at Circuit in the year 1830, in the case of Bonaparte v. Camden, & A. R. Co. (C.C.N.J. 1830) Fed.Cas.No.1,617, p. 821:

> "There is no power the exercise of which is more delicate, which requires greater caution, deliberation,

and sound discretion, or more dangerous in a doubtful case, than the issuing an injunction; * * *."

Rule 62 F.R.Civ.P. deals with the question of injunction pending appeal. Subsection (c) of that rule relates to the power of district courts to issue such injunctions pending appeal. Subsection (g) of the same rule deals with the subject on the appellate level. It is conceded that a District Court (to which the Federal Rules of Civil Procedure generally apply) may grant injunctive relief pending an appeal as provided by subsection (c). Such is the holding of the Ninth Circuit in United States v. El-O-Pathic Pharmacy, 9 Cir. 1951, 192 F.2d 62. In construing the rule and commenting on the last cited case, one of the leading commentaries on federal practice and procedure states the rule to be as follows:

> "In that case the court also pointed out that appellate courts are not as well equipped as the trial court to enforce an order of the sort in question. Thus Rule 62(g), allowing the appellate court to make such orders, should be regarded as supplementary to Rule 62(c). *In the normal case parties should be required to seek relief first from the trial court, with the appellate court acting only if the trial court has erroneously refused to grant such relief.*" (Emphasis added)

Vol. 3 Fed. Practice & Procedure, Rules Ed. (Rev. by Wright) § 1373, p. 466

It should be emphasized and made crystal clear that there is no showing before us that the appellants in this case sought interlocutory relief in the trial court.[3]

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[3] Cumberland Tel. & Tel. Co. v. La. Pub. Serv. Comm., 260 U.S. 212, 43 S.Ct. 75, 77, 67 L. Ed. 217, is a case in which the Supreme Court recognized the fact that the trial court should first be asked for such injunctive relief.

"We, of course, appreciate that, notwithstanding a denial of an injunction on its merits, a court may properly find that

My brothers of the majority have directed the issuance of a mandatory injunction, which, of necessity, is of an interlocutory nature, because this case has not been reached on its merits. A clear statement of the law is contained in W. A. Mack, Inc. v. General Motors Corp., 7 Cir. 1958, 260 F.2d 886 as follows:

> "* * * mandatory injunctions are rarely issued and interlocutory mandatory injunctions are even more rarely issued, and neither except upon the clearest equitable grounds."

See also Miami Beach Federal Savings & Loan Ass'n. v. Callander, 5 Cir. 1958, 256 F.2d 410. The usual case arises upon an appeal from an order of the trial court granting or denying a preliminary injunction and even in such cases, the scope of review is limited. In re Tucker Corp. (Veenkant v. Yorke), 7 Cir. 1958, 256 F.2d 808; Mytinger & Casselberry, Inc. v. Numanna Labs. Corp., 7 Cir. 1954,

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pending a final determination of the suit on the merits in a court of last resort, a balance of convenience may be best secured by maintaining the status quo and securing an equitable adjustment of the finally adjudicated rights of all concerned, through the conditions of a bond. Hovey v. McDonald, 109 U.S. 150, 161 [3 S. Ct. 136, 27 L. Ed. 888, 891]; Equity Rule No. 74. *But the court which is best and most conveniently able to exercise the nice discretion needed to determine this balance of convenience is the one which has considered the case on its merits and, therefore, is familiar with the record.*" (Emphasis added)

See also Peay et al. v. Cox, 5 Cir. 1951, 190 F.2d 123, wherein the court was dealing with the question of injunctions and the exhaustion of administrative remedies and there held that an injunction should not issue. The court concluded that state remedies which are *administrative* as distinguished from those which are *judicial* should first be exhausted, because the exhaustion of administrative remedies does not result in the matter becoming res judicata; citing with approval Bates, et al. v. Batte, et al., 5 Cir. 1951, 187 F.2d 142; Cook v. Davis, 5 Cir. 1949, 178 F.2d 595; Shinholt, et al. v. Angle, 5 Cir. 1937, 90 F.2d 297.

215 F.2d 382; O'Malley, et al. v. Chrysler Corp., 7 Cir. 1947, 160 F.2d 35; Vol. 3 Fed.Practice & Procedure, Rules Ed. (Rev. by Wright) § 1373.

In directing the District Court to issue a mandatory injunction pending determination of the appeal in this case on the merits, the majority claims that it is acting "in line with the procedure which we followed * * *." in Stell et al. v. Savannah-Chatham Co. Board of Education et al., 5 Cir., 318 F.2d 425, May 24, 1963. In making such an assertion, the majority is clearly in error because it has overlooked the fact that the appeal in Stell was interlocutory as provided by 28 U.S.C.A. 1292(1), from a judgment of the District Court denying a motion for preliminary injunction. The relief granted in Stell purports to have been granted under the All Writs Act 28 U.S.C.A. 1651(a). That opinion recognizes that the All Writs Act was intended to be used only in the exceptional case where there had been an abuse of discretion or usurpation of judicial power, and should be used only in "extreme cases". The authorities there cited, Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 74 S.Ct. 145, 98 L.Ed. 106; and LaBuy v. Howes Leather Co., 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290, do not support the action of the majority in this case.

All 3 cases, Stell, Bankers Life, and LaBuy, involve interlocutory appeals relating to the denial or granting of *interlocutory* relief. It was never intended that the All Writs Act should be used as a substitute for appeals, and this is true even though hardship may result from delay. In any event, a heavy burden is placed upon those who petition for the writ to show that their right to its issuance is "clear and undisputable". Although the writ sought in Bankers Life was a writ of mandamus, the court was speaking of the All Writs Act, 28 U.S.C.A. 1651(a) when it there observed:

> "* * * Congress must have realized that in the course of judicial decision some *interlocutory* orders might be erroneous." (emphasis added)

The court assumed the existence of the difficulties of which petitioner there complained, resulting in the creation of many legal and practical problems, but the court observed:

> "* * * but Congress must have contemplated those conditions in providing that only final judgments are reviewable."

The Court concluded:

> "But it is established that the extraordinary writs cannot be used *as substitutes for appeals,* Ex parte Fahey, 332 U.S. 258, 259-260, [67 S.Ct. 1558, 91 L.Ed. 2041-2043] (1947), even though hardship may result from delay and perhaps unnecessary trial, United States Alkali Export Assn. v. United States, 325 U.S. 196, 202-203, [65 S.Ct. 1120, 89 L.Ed. 1554, 1560, 1561] (1945); Roche v. Evaporated Milk Assn., supra, [319 U.S. 21], at 31 [63 S.Ct. 938, 87 L.Ed. 1185]; *and whatever may be done without the writ may not be done with it.* Ex parte Rowland, 104 U.S. 604, 617 [26 L.Ed. 861, 866] (1882)."[4] (Emphasis added)

Traditionally, injunctions pending appeal have been issued in cases of extreme emergency, to avoid mootness, to preserve the status quo, to protect the jurisdiction of the court; and in the leading cases on the subject, if not all, injunctive relief pending appeal is granted only after the trial court has refused to grant interlocutory relief. Such a request was made in the Stell case. No such action was requested of the trial court in the instant case. Not only is it unfair and inconsiderate for an appellate court to grant such relief pending appeal when the trial court has had no opportunity to pass upon the question, such relief should never be granted *as a substitute for an appeal.* In passing upon injunctive relief, the court should take no action which will preclude fair consideration on the merits. As stated in Mesabi Iron Co. v. Reserve Mining Co., 8 Cir. 1959, 270 F.2d 537:

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[4] See also Cumberland Tel. & Tel. Co. v. Louisiana Pub. Serv. Comm., 260 U.S. 212, 43 S. Ct. 75, 67 L. Ed. 217; and in re Philadelphia & Reading Coal & Iron Co., 103 F.2d 901, 903 (3 Cir. 1939); and Greene v. Fair, 314 F.2d 200 (5 Cir. 1963).

> "* * * the appellate court ought not to determine crucial questions conditioning the merits of the case * * *."

If this is the law in cases where interlocutory relief is first sought in the trial court, such a rule should be more strictly followed in cases where no interloctutory relief was sought in the lower court. Prior to the instant case, such has been our holding. As stated in Miami Beach Federal Savings & Loan Ass'n, supra:

> "We have repeatedly held that an order for a temporary injunction does not and cannot decide the merits of the case."

This court has recently spoken concerning the extraordinary remedy of injunction pending appeal in Greene v. Fair, Feb. 18, 1963, 314 F.2d 200, and there clearly stated the controlling principles:

> "The reason for the sparing use of this power is apparent. Litigants are given the opportunity to try their cases in a district court and they are given an unlimited right of appeal to the Courts of Appeal. The rules of this Court make possible a prompt hearing of all regularly docketed appellate cases. The rules provide for accelerated hearings in cases in which cause therefor is shown. The vindication of private rights by litigation necessarily entails some delay. Laymen and courts alike regret any delay in the vindication of

a right that is not the natural and proper result from the orderly handling of the litigation. Historically and traditionally within our system of justice, appellate procedure calls for the docketing of a case, the furnishing of the transcript of the record to the appellate judges, a full briefing by the appellant, with an opportunity for response to be made by the appellee, and oral argument after consideration of the records and briefs by the Court. The time required to prosecute an appeal in this manner is recognized by all to be time well spent in the ordinary case."

(b) The Ruling and Mandate of the Majority:

The majority opinion asserts that nothing contained therein is to be construed as enjoining or restricting voluntary segregation. This Court is unequivocally committed to the proposition that voluntary segregation is permissible. The order and opinion before us for review do not require segregation, but most emphatically state that any action on the part of the Superintendent and Board requiring segregation will not be tolerated. Accordingly, it is difficult for me to see any useful purpose in issuing the extraordinary writ of injunction pending appeal. As a matter of fact, in the case of Rippy v. Borders, 5 Cir. 1957, 250 F.2d 690, this Court specifically held that a district court should not issue an order enjoining the school board from "permitting" segregation. Briggs v. Elliott, E.D. S.C. 1955 (three-judge court composed of Parker and Dobie, Circuit Judges, and Timmerman, District Judge), 132 F.Supp. 776; Avery v. Wichita Falls Independent School Dist., 5 Cir. 1957 (Judge Rives), 241 F.2d 230; Borders v. Rippy, 5 Cir. 1957 (Judge Rives), 247 F.2d 268; Boson v. Rippy, 5 Cir. 1960 (Judge Rives), 285 F.2d 43.

As a matter of fact, the opinion and order clearly state that the District Court "* * * will not sanction discrimination * * *," and the doors of the court are held open to hear any complaint of "* * * *any unconstitutional application* of the Alabama School Placement Law against the plaintiffs, or others similarly situated, or *any other unconstitutional action* on the part of the defendants against them." (Emphasis added.)

The cases cited in the majority opinion, particularly Gibson (2 appeals), Holland, Mannings, Augustus, and Bush, all denounce "the *requirement* of racial segregation in the public schools." (Emphasis added.) In the first Gibson appeal, in speaking of the Florida law, it was stated, "* * * neither that nor any other law can justify a violation of the Constitution of the United States by the requirement of racial *segregation* in the public schools." (Emphasis added.) To the same effect was the second Gibson appeal.[5] The opinion and order now before us for

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[5] In the first Gibson case, for example, there was a rule of the school board directed to the superintendent, principals, and all other personnel, advising them that the public school system of Dade County, Florida, "will continue to be operated, maintained and conducted on a nonintegrated basis." In the second Gibson appeal, Judge Rives states that the racial factor was imminent in the consideration of the assignment and transfer of pupils under the plan there being considered. For example, the application contained a blank space after the word "school", and did not permit a "* * * conscious preference for continued segregation on a voluntary basis." It was also stated that certain forms and school records continued to emphasize "White" and "Negro"; and it was finally held that for all practical purposes "* * * the *requirement* of racial segregation in the public schools continue[d] at the time of trial." (Emphasis added.)

In Holland, Judge Rives reaffirmed that the Alabama School Placement Law is approved; but as to the Florida Pupil Assignment Law, cited the first Gibson case as to "* * * the requirement of racial segregation in the public schools * * *". See majority opinion.

The Mannings case related to a procedural question. There the court dismissed the complaint without affording the plaintiffs an opportunity of making proof of their allegations. Accordingly, review do not require segregation, but provide a means of orderly desegregation.

The most recent decisions bearing on the issues before us are two cases from our own court, the Stell case, and Calhoun v. Latimer, 5 Cir., 321 F.2d 302; and two Supreme Court cases, both decided on June 3, 1963, McNeese v. Board of Education, involving an Illinois statute, and Goss v. Board of Education of Knoxville, Tenn., 83 S.Ct. 1405. In addition to the distinguishing features in the Stell case which we have heretofore mentioned, a reading of that opinion will show that admission and attendance at schools in Savannah-Chatham County, Georgia, was *required* on a racial basis. The opinion further stated that evidence was admitted and considered which "* * * tended to support the thesis that compliance with the Supreme Court's decision (Brown v. Board of Education) would be detrimental to the Negro plaintiffs and the white students in the Savannah-Chatham County school system." The so-called Atlanta Plan approved in the Latimer case supports the decree of the District Court here involved. As a matter of fact, the decree of the District Court authorizes a procedure for desegregation as to all 12 grades, which the Atlanta Plan does not. This is not a criticism of the Atlanta Plan. The Supreme Court and the decision in Latimer, as well as numerous other cases, recognize the well known fact that all cases are not alike.

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whatever the complaint alleged was considered true under the procedure, and the complaint alleged compulsory racial segregation.

In Augustus, the Florida Pupil Assignment Law was still under attack and each year the Board passed a resolution assigning each pupil back to the school which he had previously attended. The district court in Augustus found that the racial factor was a consideration in the assignment of students and that the Placement Law was being used for that purpose.

In Bush, two district judges and the Court of Appeals found that the Placement Law there *involved* was "* * * being used to maintain segregation * * *," and there was no approval of the Placement Law there involved such as the approval given the Alabama Placement Law in Shuttlesworth.

In the McNeese case, the court was considering an administrative remedy provided by the Illinois school code. First, the court decided not to apply the rule announced in Burford v. Sun Oil Company, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 relating to abstinence by a federal court in cases where state administrative remedies are made available. As to that question, the court found, "We have, however, in the present case no underlying issue of state law controlling this litigation." The court reasoned that " * * * it is by no means clear that Illinois law provides petitioners with an administrative remedy sufficiently adequate to preclude prior resort to a federal court for the protection of their federal rights." The court concluded that the Illinois law was no remedy at all.[6] McNeese asserts that "[i]t would be anomalous to conclude that such a remedy forecloses suit in the federal courts when the most it could produce is a state court action that would have no such effect." The opinion rendered by the District Court in the instant case does not authorize or tolerate the procedure criticized in the McNeese case. Footnote 2 of the District Court's opinion provides, "After administrative remedies before the school board have been exhausted, judicial remedies for denial of constitutional rights may be pursued *at once in this court* without pursuing state court remedies." (Emphasis added) The McNeese case did not hold or intimate that it was unlawful for a district court to require limited administrative procedure such as that required by the holding of the trial court in this case. Regardless of what we say, school systems must be operated by school superintendents and school boards, or by some administrative agency. All administrative procedure is not unlawful. Indeed, schools cannot operate without administrative procedure. As stated in Latimer, "The courts are ill equipped to run the schools."

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[6] It was pointed out in the opinion that before the question of segregation in a school on account of race could be presented to the Superintendent of Public Instruction, 50 residents of a school district, or 10% whichever is lesser, were required to file a complaint. Any final decision by the Superintendent was subject to review by the courts. The Superintendent himself apparently had no power to order corrective action. His only function was to investigate, recommend and report. He could give no remedy. He could make no controlling finding of fact or law, and his recommendations were not required to be followed by any court or executive order. Numerous other deficiencies in the Illinois law are made clear by the opinion.

In the Goss case, the difficulty complained of related to transfer provisions of the school desegregation plan. As there stated, "* * * by the terms of the transfer provisions, a student, upon request, would be permitted, solely on the basis of his own race and the racial composition of the school to which he has been assigned by virtue of rezoning, to transfer from such school, where he would be in a racial minority, back to his former segregated school where his race would be in the majority." The transfer system there under attack was held to work only to the end that segregation would be perpetuated. Transfers were available only to those who wished to attend schools where their race is in the majority and "* * * there is no provision whereby a student might transfer upon request to a school in which his race is in the minority, unless he qualifies for a 'good cause' transfer." The court concluded:

> "[W]e note that if the transfer provisions were made available to all students regardless of their race and regardless as well of the racial composition of the school to which he requested transfer we would have an entirely different case. Pupils could then at their option (or that of their parents) choose, entirely free of any imposed racial considerations, to remain in the school of their zone or transfer to another.
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> * * * * * * *
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> "This is not to say that appropriate transfer provisions upon the parents' request, consistent with sound

school administration and not based upon any state-imposed racial conditions, would fall. * * *"

I find none of the defects in the opinion and order of the District Court which are condemned in Goss.

III. DELAY AND EMERGENCY

Considerable emphasis is placed upon the matter of delay from the time the suit was initially filed in the District Court on June 17, 1960, until a final decision was rendered on the merits on May 28, 1963. Briefs of the appellants mention this delay and the majority opinion places emphasis on it. During the course of oral argument, appellants were interrogated by the court as to the delay involved, and the court was assured by counsel that no point was now being made with respect to delay. The matter continues to arise however, in spite of the fact that we do not have the record before us to determine if there was *unnecessary* delay. There is nothing to show that the parties litigant sought an earlier hearing. We judicially know of the excellent record of the U.S. District Court for the Northern District of Alabama for the expedient dispatch of business. If there has been unnecessary delay in this case, it constitutes the exception rather than the rule. The case of Nelson v. Grooms, 5 Cir. 1962, 307 F.2d 76, may reveal some facts touching the question of delay. In the Nelson case the parties sought a writ of mandamus against U. S. District Judge H. H. Grooms, because he continued the Nelson case pending hearing in the Armstrong case, rather than grant the petitioners' application for preliminary injunction filed on June 13, 1962. The Nelson case was decided by a panel of this court on August 17, 1962. In the Nelson case it was alleged that the Armstrong case (presently before us) had been pending since June 17, 1960, but it was asserted that counsel for Armstrong were W. L. Williams, Jr. of Birmingham and Ernest D. Jackson, Sr. of Jacksonville, Florida; whereas, counsel for Nelson were Constance Baker

Motley of New York, and Orzell Billingsley, Jr. and Peter A. Hall of Birmingham. That fact was alleged as a reason why the cases should not be consolidated.[7] The Nelson case is no longer before us, because the plaintiffs have moved from Birmingham and that case has been dismissed. No attack had been made on the action of the court with respect thereto. Presently, in this case, the Armstrong case, Attorneys Williams and Jackson still appear of record as counsel for Armstrong; but in addition, George White of Birmingham and Constance Baker Motley, [sic] Jack Greenberg and Leroy D. Clark, all of New York, are also counsel. No criticism is made of the litigants or the lawyers involved as to the arrangements made for handling the cases. Of course, the litigants and the lawyers are free to deal with each other. It is a singular fact however, that at least two of the attorneys who originally filed the Armstrong case remain in it and so far as we know, no complaint was ever made of the delay involved. In Judge Grooms' order it is recited that Judge Lynne would likely hear the Armstrong case in October 1962, and the hearing was held in October 1962.[8] Judge Grooms' order was entered in June 1962, and therefore everyone knew of the proposed hearing date for the Armstrong case as early as June 13, 1962. On the other hand, one of the attorneys who handled the Nelson case where complaint of delay was involved, and mandamus sought, now appears in the Armstrong case. So far as we are able to determine from anything before us, no complaint has ever been made, prior to this time, of the alleged delay in the Armstrong case. Courts are often reluctant to force parties to trial when the litigants on both sides prefer not to proceed to a trial, and many times cases are delayed for the convenience of the parties or for other legitimate reasons. Usually a change in counsel actively handling the case will result in delay. We cannot determine these questions when we have not seen the record.

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[7] We quote from the petition for mandamus in the Nelson case filed by the same counsel who orally argued the Armstrong case before this court:

> "Counsel for the plaintiffs in the Armstrong case are not the same as counsel for the petitioner here. Counsel for the plaintiffs in the Armstrong case are: W. L. Williams, Jr., 1630 Fourth Avenue, North, Birmingham, Alabama, and Ernest D. Jackson, Sr., 410 Broad Street, Jacksonville, Florida."

[8] The hearing before Judge Lynne was concluded the latter part of October, and the parties were given time to file briefs. In addition, the record of the testimony had to be transcribed.

Certainly, there has been no delay in this court. On the 26th day of June 1963, this court considered six (6) cases, all assigned for argument on an *emergency* basis. The six (6) cases are as follows:

1. Armstrong et al. v. Board of Education of the City of Birmingham, Jefferson County, Alabama, et al.

Decided in District Court on May 28, 1963; notice of appeal filed June 3, 1963; motion for injunction pending appeal filed on June 3, 1963; order assigning the case for oral argument on June 26, 1963, filed on June 5, 1963; and full oral argument was heard on June 26, 1963.

2. W. G. Anderson et al. v. City of Albany et al., 5 Cir., 321 F.2d 649.

Filed on July 24, 1962; the District Court heard 5 volumes of testimony (over 1300 pages) and entered an order dismissing the case on February 14, 1963; motion for injunction pending appeal or in the alternative to advance the case on the docket for argument on the merits filed May 31, 1963; on June 5, 1963, an order was filed assigning the case for hearing on the merits on June 26, 1963; and on June 26, 1963, the case was extensively argued on the merits.

This case relates to injunctive proceedings against the City of Albany with respect to certain public facilities. One of the chief complaints of the appellants when the suit was initially filed, was the fact that the City of Albany had in effect ordinances requiring segregation of certain of the facilities involved. At the time of argument, all such ordinances had been repealed and there was no compulsory segregation of such facilities. In addition to extensive oral argument on June 26, 1963, another petition seeking an injunction pending appeal was heard before Judge Bell and denied by him on June 13, 1963.

3. NAACP v. Thompson, Mayor of the City of Jackson, Mississippi, et al., 5 Cir., 321 F.2d 199.

Filed June 7, 1963; hearing conducted and relief denied by U.S. District Court on June 11, 1963; motion for injunction pending appeal filed in this court on June 12, 1963; order entered on June 14, 1963, assigning the case for hearing on the motion for June 26, 1963, at which time full argument was heard.

The relief sought is an injunction against the Mayor and city officials of the City of Jackson, Mississippi, restraining and enjoining them from interfering with parades, protests, street demonstrations, and from arresting Negro citizens who refuse to leave private businesses upon being requested to do so.

4. In the Matter of Application of Brown v. Rayfield, Chief of Police of City of Jackson, Mississippi (In the Matter of Application of Richards v. Rayfield), 5 Cir., 320 F.2d 96.

Petition for writ of habeas corpus filed on June 7, 1963; hearing conducted and writ denied on June 12, 1963, at which time the U. S. District Court refused to certify probable cause; on June 13, 1963, a Judge of this court signed a certificate of probable cause; motion for immediate hearing filed on June 14, 1963; on June 14, 1963, motion granted and case was assigned for immediate hearing on June 26, 1963; and on June 26, 1963, extended oral argument was heard.

This writ of habeas corpus sought the release of two Negro citizens who had been arrested in connection with street demonstrations. No effort was made to exhaust state remedies as required by law, because it was alleged that "members of the various state courts" of the State of Mississippi could not give a fair hearing to the petitioners, and that an effort to obtain state remedies would be futile. The petition also complained that the petitioners were confined in segregated jails in contravention of their constitutional rights. According to affidavit of the Respondent Rayfield, both petitioner-appellants were released from custody on June 15, 1963, by posting with the Clerk of the Municipal Court of the City of Jackson, Mississippi, an appearance bond in the sum of $100.00 for each of the appellants.

5. Kennedy v. Owen, Circuit Court Clerk and Registrar, Jefferson County, Mississippi, et al., 5 Cir., 321 F.2d 116.

(7 cases consolidated) Various applications were filed seeking an order of the District Court compelling the production of records by clerks and registrars. Said petitions were filed on various dates, but some were filed in the month of May 1963; District Court held hearing and entered decree granting partial relief and denying some relief sought on June 11, 1963; notice of appeal filed June 18, 1963; motion for summary reversal filed in this court June 20, 1963; order filed June 20, 1963, assigning the cause for oral argument on June 26, 1963; and on June 26, 1963, extended oral argument was heard.

By reference to opinion already released, it will be observed that the only question related to the sufficiency of a demand by the Attorney General which was addressed to the parties in their capacity as clerks only; whereas, the parties held the dual position of clerk and registrar.

6. United States v. Dallas County, Alabama, et al.

Complaint seeking injunction filed in U. S. District Court for the Southern District of Alabama at 4:30 P.M. on June 26, 1963; relief denied on June 26, 1963; notice of appeal filed June 26, 1963, and application made to this court for injunction at 9:00 P.M. June 26, 1963, at which time full oral argument was heard.

In this proceeding the United States sought to enjoin the Circuit Solicitor of the 4th Judicial Circuit, the County Solicitor of Dallas County, the State Judge having jurisdiction of the case, the Sheriff of Dallas County, Alabama, and Dallas County, Alabama, from prosecuting a 19 year old Negro youth on a charge of resisting arrest and engaging in conduct calculated to cause a breach of the peace. Although the alleged offense was committed on June 17, 1963, and the defendant arrested on that date, no effort was made to enjoin the prosecution until June 26, 1963.

It should be noted that in 3 of the cases outlined, relief was sought in the U. S. District Court, action taken by the District Court, the case appealed, and full oral argument heard by this court in 19 days or less. Opposing litigants were required to appear before our court on unusually short notice, without sufficient time, in some cases, to prepare a brief. Some briefs were hurriedly prepared, typed and filed on the day the case was submitted to this court. Generally, administrative matters of the court, and cases which seek emergency relief, are handled by the court without formal oral argument. In the 6 cases mentioned, full and extended oral argument was permitted.

There is another factor which I feel it is my duty to mention as a matter of information to attorneys who appear before our court.[9] The arguments presented in some of the cases mentioned above contained insinuating overtones unfavorably reflecting on both the Federal and State Judiciary, in certain localities, varying in degree from the barely audible tinkling of a distant cymbal to the crashing noise of sounding brass. It is fundamental that lawyers owe full allegiance to their clients and should use their learning, skill, diligence, devotion, and "* * * all appropriate legal means within the law to protect and enforce legitimate interests."[10] Lawyers are required in the discharge of their duties to disagree with judges, to allege error, to attack the judges' rulings and decisions, and even to render just and proper criticism of such rulings, decisions and judgments. But the *Office of Judge*, whether it be Federal or State, requires the respect of the legal profession to the end that the dignity and independence of the judiciary may be maintained, regardless of the individual who may occupy such office at any given time. It is not appropriate, in my opinion, for lawyers, who are officers of the courts, to condemn all of the courts of a state, or to reflect improperly upon the courts generally by condemnation of such courts as a class or group. Such arguments are highly improper and are disapproved.[11]

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[9] See Canons of Judicial Ethics, American Bar Association, Canon No. 11; Handbook for Judges (Carroll, Ed. 1961) American Judicature Society, p. 7.

At the time the above mentioned 6 cases were being heard, there were pending in this court 260 cases which could be calendared and heard during the summer recess. 117 of such cases could be calendared during July. Further, in addition to the 260 cases which have not been submitted there were, on June 26, 1963, 237 cases which had already been submitted to the court but not decided. Some of the 237 cases were argued and submitted over a year ago; 40 were submitted before January 1, 1963, and the balance were submitted since January 1, 1963. These 237 cases are now being considered by the court. All of the cases combined make a total of almost 500 cases pending in this court as of June 26, 1963. Consideration of them will come in the normal course of the court's business, but the 6 cases outlined above received special emergency attention. The workload of this court is currently the heaviest of any Court of Appeals in the nation. The record of this court in hearing and deciding cases is as good as any. That record cannot long endure if certain cases are to be given special attention and considered on a preferential basis. In the vast number of cases now pending before this court are matters of tremendous importance involving business affairs, taxes, property, personal injuries, life and liberty. With deference and full respect, I feel it is my duty to express the opinion that the 6 cases which were fully argued on June 26, 1963, were not of such overwhelming importance as to take precedence over all other cases then pending in this court.

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[10] See Code of Trial Conduct, American College of Trial Lawyers, 1962-63.

[11] See Canons of Professional Ethics, American Bar Association, Canon No. 1.

IV. Ex Banc Hearing

Because of the importance of this case both as to the motion for injunction pending appeal and the merits of the case on appeal not yet heard, because of the extraordinary relief granted which conditions the merits of the case before an examination of the record by the court, the hurried and emergency action taken by the court, the unique procedure involved, and for other reasons which appear to me sufficient, I hereby request, as authorized by Rule 25a of this court and the applicable statutes,[12] that the court reconsider, rehear and decide this case En Banc, and I hereby initiate consideration of this request by each of the Judges of the Court. See United States v. New York, N. H. & Hartford Railroad Co., 2 Cir. 1960, 276 F.2d 525; Puddu v. Royal Netherlands, etc., 2 Cir. 1962, 303 F.2d 752; Walters v. Moore-McCormack Lines, Inc., 2 Cir. 1963, 312 F.2d 893.

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[12] 28 U.S.C.A. § 46. "Assignment of judges; divisions; hearings; quorum

"(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit."

ON PETITION FOR REHEARING BY FULL COURT

Per Curiam.

One of the members of this Court, having in the dissenting opinion requested a rehearing of the case en banc, the Chief Judge polled the Circuit Judges of this Circuit who are in active service to determine whether an en banc rehearing should be ordered by a majority of such Judges. A majority of the Judges of the Circuit in active service, having voted against convening the Court en banc for the purpose of such rehearing, the petition of the appellees for rehearing by the Court en banc is Denied.

The Petition for Rehearing is Denied.

Gewin, Circuit Judge, dissenting.

Cameron, Circuit Judge (dissenting).

On July 12, 1963 a panel of this Court composed of Chief Judge Tuttle and Judges Rives and Gewin filed an opinion and order in this case, ordering the District Court for the Northern District of Alabama to enter the judgment therein set forth, the opinion being written by Judge Rives, a special concurrence by Judge Tuttle, and a dissent by Judge Gewin. Judge Gewin requested that the Court *in banc* reconsider and decide the case and I joined in that request. The Chief Judge advised that the request had been denied by a five to four vote of the members of the Court. I respectfully dissent from the action of the members of the Court in refusing this *in banc* hearing and from the failure of the panel to grant the *in banc* hearing requested by the appellees in a telegram to each of the Judges of the Court prior to the beginning of the hearing of the case by the panel.

Since the filing of the opinion and order on July 12th by the panel of three Judges the appellees have filed with the clerk of this Court a petition for rehearing and reconsideration of the decision and order of the panel. I am advised that a sufficient number of the petitions for rehearing was filed for the distribution, as requested by appellees, of a copy of the petition to each of the Judges of the Court. I am further advised that no copies of the petition for rehearing were submitted to any of the Judges of the Court except the members of the panel which had heard the case. That panel has, with Judge Gewin dissenting, entered an order declining the prayer for an *in banc* hearing and denying the rehearing; and orders have been entered accordingly. I respectfully dissent from these actions of the panel and the orders entered in connection therewith.

The decision of this panel involves questions of procedure which have for some weeks plagued and are still plaguing the Court. The Judges of the Court are sharply divided on these questions and not only the lawyers of the Circuit, but the public generally, are displaying open concern with respect to inconsistent positions which they conceive are being taken by the Court.[1] I feel constrained to present in

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[1] A feature article dated at New Orleans and appearing in the public press of July 20, 1963, presents a widely held conception of the situation. Excerpts from that article follow:

> "The U. S. Circuit Court for the Fifth Circuit has blazed new legal trails for nearly a decade in the deep south in the civil rights struggle for which Negroes are now demonstrating. * * *
>
> "The Court's 'hard core' majority has moved at every opportunity, within its appellate power, to implement this school decision. Its orders, some without precedent, forced

this dissent the result of some studies I have made and some views I entertain with respect to those questions, some of which have been so ably and exhaustively discussed by Judge Gewin in his dissenting opinion, in which I fully concur.

The procedure followed by the majority here is one which, in my opinion, is not sanctioned by the law. The hearing before these three Judges *was not an appeal.* Rather, it was what the Third Circuit has termed something "in the nature of an original proceedings * * *."[2] It was the substitution of a hearing on "injunction pending appeal" for a hearing on appeal. Theoretically the appeal is still pending, but it is apparent that there is little or nothing more to hear since the decision and order of the majority of the panel are on the merits of the case,

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the riot-triggering admission of James Meredith to the University of Mississippi last year:

"It often has moved ahead of the Supreme Court to use the 1954 decision as a guideline to order desegregation of other facilities—buses, terminals, libraries, city auditoriums, parks and playgrounds. * * *

"It has repeatedly overruled, and often sharply rebuked, Southern district court judges who have refused to accept or carry out the Supreme Court's rulings. * * *

"The split was exemplified by the Court's recent 4-4 deadlock over the issue of a jury trial for Mississippi Governor Ross Barnett on criminal contempt charges growing out of his defiance of its orders to integrate Ole Miss. * * *

"The four judges who opposed a jury trial for Barnett have stood together consistently in decisions on civil rights cases. They are Chief Judge Tuttle and Judges Richard T. Rives of Montgomery, Alabama, John Minor Wisdom of New Orleans, and John R. Brown of Houston. * * * "

These four Judges will hereafter sometimes be referred to as The Four.

[2] Two Guys from Harrison-Allentown, Inc. v. McGinley, 1959, 266 F.2d 427, 431-432, Note 6.

deciding in full, without the benefit of any record of the evidence in the lower court, the questions of law and fact which were before that court in its extended hearing. This phase of the vexatious problem before us has been so well handled by Judge Gewin's dissent that I rest on what he has said, with a few supplementary remarks.

I.

All of these unorthodox procedures have arisen in cases involving racial problems. Attention is focused on several of them in the five opinions written by members of this Court in No. 20240, United States of America v. Ross R. Barnett and Paul B. Johnson, Jr., April 9, 1963, which aggregated a total of one hundred thirty pages; while other angles of the procedural questions were dealt with at some length in United States v. Lynd, 5 Cir., 301 F.2d 818, and the same case decided July 9 and 15, 1963 by a panel composed of Judges Brown, Wisdom and Bell, 321 F.2d 26. The last sentence of Judge Bell's special concurrence in the July 9th hearing characterizes poignantly the dilemma into which this Court has been plunged since it set itself the task of inventing special procedures for the handling of such cases:

> "This case serves as a classic example of the pitfalls to be encountered, with the attendant disruption and delays in the orderly administration of justice, when courts depart from the time-tested processes of law."

The present wave of petitions for treatment according to the new and unusual procedures described in Judge Gewin's dissent, may be said to have been set off by an order granted by Chief Judge Tuttle on May 22, 1963 in No. * * *, Linda Cal Woods by Next Friend v. Theo R. Wright, Superintendent of Schools of the City of Birmingham. The incomplete record of this case on file in this

Court states that, on May 21, 1963, this class action was brought against the Superintendent of Schools in the City of Birmingham for an order enjoining him from enforcing a directive of the Board of Education of Birmingham suspending the minor Linda Cal Woods and expelling or suspending approximately 1080 other Negro students from the public schools of Birmingham on the alleged ground that they had been arrested for parading without a permit. The order entered by the Judge of the District Court on May 22nd recites that the case came on for hearing before him on motion for temporary restraining order and/or preliminary injunction and states that the prayer for both was denied. Reproduced in the margin are excerpts from this order of the District Court.[3]

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[3] After reciting its finding that those attending the public schools of Birmingham had been cautioned not to stay away from school during the remaining weeks of the session, the order continues:

> "This Court was shocked to see hundreds of school children ranging in age from six to sixteen running loose and wild without direction over the streets of Birmingham and in the business establishments. It is due to the patience and good judgment of the people of Birmingham and the police officials particularly that no one was seriously injured on May 7, 1963, when the demonstrators were allowed by the police department and city officials of Birmingham to parade within a certain designated area, and the hundreds of school children in the parade refused to stay within the boundaries of the parade area, broke through the police and for some forty-five minutes ran wild over the City of Birmingham.
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> "This Court cannot conceive of a Federal Court saying to the Board of Education of the City of Birmingham, made up of dedicated, courageous, honorable men that they should take no action under the circumstances and that the children *who deliberately failed to attend school for some several days should not in any way be punished or penalized.* White students in recent weeks have been suspended or expelled from the Birmingham high schools for similar or lesser offenses. * * * This Court feels that the Board of Education of the City of Birmingham in its disciplinary problems deserves no interference

The order signed by Chief Judge Elbert P. Tuttle on the same day recites in part the following:

> "The appellant * * * has made application to me to grant an injunction * * * pending an appeal on the merits of the case in this Court. Appellant contends that I have jurisdiction as a member of the Court of Appeals for the Fifth Circuit to grant such an injunction pending appeal under the terms of 28 U.S.C.A. § 1651(b). * * *
>
> "It is clear, therefore, that the Court of Appeals has jurisdiction of this appeal within the contemplation of Section 1651(b). I, therefore, hold that I have jurisdiction and the power to grant the relief here sought. See Aaron v. Cooper, 8 Cir., 261 F.2d 97. See also Rule 62(g), Federal Rules of Civil Procedure, * * *

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from this Court so long as it stays within reasonable bounds. The Court has been assured by the Board of Education that proper officials are presently in the process of giving each and every student who has been notified that he has been suspended or expelled, a speedy, fair and comprehensive hearing, that the students have been notified of the specific charges, brought against them which, if proven, would justify discipline or expulsion under the regulations or policy of the Board of Education.

"This Court has been advised that the suspension or expulsion of no child will be upheld by the school Board, after a hearing, due to prejudice, anger or in retaliation.

"The Court feels that this is borne out by the fact that the school Board in adopting its policy at the same time stipulated that all students, whether expelled or suspended, would be allowed to make up the work that they had lost in summer school. * * * Furthermore, the Court finds that suspension, pending a hearing and opportunity to make up the work in the summer in any event is not unduly harsh under the circumstances, taking into consideration the necessity of maintaining the morale and efficient operation of the school system

"It is, therefore, at this time, Ordered, Adjudged and Decreed that plaintiff's motion for a temporary restraining order be, and the same is hereby denied." [Emphasis added.]

> "Although on the record before me it appears shocking that a Board of Education, interested in the education of the children committed to its care, should thus in effect destroy the value of one term of schooling for so many children at a time when all persons professionally interested in the educational process and the welfare of young people are bending their efforts towards minimizing school dropouts and emphasizing the need for continuing education, the right of the appellant to succeed here cannot be based upon this consideration. If appellant is entitled to an injunction it must be based *on my determination that there is a clear right to the relief* sought in the trial court and that an irreparable injury will result *to appellant and the class which she represents unless the relief by injunction pending appeal is granted.*" [Emphasis added.]

Judge Tuttle's order contains these directives:

> "It is ORDERED that Theo R. Wright [and his agents, etc.] * * * are hereby enjoined from continuing to enforce and carry into effect the order of the Board of Education issued by letter on May 20, 1963 * * *
>
> "The said appellee [and the others] are further *ordered to inform all principals* of all schools in the Birmingham school system who received the letter of direction from respondent dated May 20, 1963, * * * *that the letter of direction of May 20, 1963, is rescinded and revoked* and all students affected thereby are to be permitted to return to their respective classes as regular students immediately. Pending the actual rescission of the said letter, *appellee is ordered to make known in any way available to him or to the said students that they are permitted to return to school* on Thursday, May 23, 1963.

> "* * * This order shall stay in effect until the final determination of this appeal on the merits or until the further order of the Court." [Emphasis supplied.]

The file furnished me by the clerk's office shows that the hearing before Judge Tuttle was had upon an unsworn "petition" to which was attached what was alleged to be copies of several letters of May 20th, one from the principal of Washington School to Reverend Calvin Woods, father and next friend of the plaintiff, and others from the superintendent of schools [illegible] other school officials, all referring to the suspension or expulsion of children from the schools in Birmingham because of their participation in the "demonstrations" then taking place in the streets of Birmingham. The only proof conforming to the Rules governing granting of temporary injunctions was an affidavit by Reverend Calvin Woods, all of which referred to his daughter Linda and her conduct. As far as I can find there was no refutation at all of the findings of the District Judge concerning the conduct of the hundreds of students besides Linda Cal Woods, the unexcused school absences, the representations to the District Court by the Board of Education and the other important facts found by the court below as the basis of its denial of the motion for the temporary restraining order. There were no pleadings on behalf of the school board, because there had been no service of process or opportunity to file such pleadings.

Nevertheless, Judge Tuttle entered an order finding that there was no genuine dispute as to the fact that the students involved were arrested for participating in a demonstration against polices and practices of segregation either by the municipal government of Birmingham, the school system of Birmingham, or certain businesses in Birmingham whose segregation policies had previously resulted in the arrest of a number of Negro prisoners under either the segregation statutes of the City of Birmingham or the antitrespass laws of the State of Alabama.

Even assuming that there was an appeal then pending from the decree of the District Court to this Court, there was, in my opinion, *no jurisdiction in the Chief Judge to to hear or dispose of the motion for temporary injunction,* especially one granting the order he essayed to enter, including, as it does, provisions for mandatory relief effectively disposing of the case on its merits. In the very nature of things, it was inevitable that the School Superintendent would obey the fiat of the Chief Judge of this Court whether it was backed by the authority of the law or not. No action could be taken which would obliterate the harm done to the Birmingham school system by this improvident order.

Unfortunately, efforts made by members of the Court to obtain an authoritative ruling on the legality of the order from the Judicial Counsel or the full Court were thwarted by the opposition of The Four.[4]

The majority in the instant case—as has been true in similar decisions rendered in the past few weeks—placed its reliance chiefly upon case No. 20557, Stell et al. v. Savannah-Chatham County Board of Education, et al., 5 Cir., 318 F.2d 425. The injunctive order issued by the majority in the present case is modeled upon the order granted in the Stell case. Judge Gewin, in his dissenting opinion here, shows clearly that the present case is not controlled by the Stell case. In addition, I think that the

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[4] The entry made on the Minutes of the meeting of the Judicial Council for the Fifth Circuit in New Orleans on May 29, 1963 follows:

> "The power of a single Circuit Judge to act in certain instances including the power to grant injunctive relief was next discussed. It was not possible to resolve the question of power by rule or otherwise due to an even division among the members of the Council as to the presence or absence of such power, and because some felt that it was not the appropriate subject matter of a rule."

Stell case should not be followed because it was illegally advanced and set for special hearing by the Chief Judge before a panel selected and assigned by him alone.[5] I am unable to find any authority which is vested in the Chief Judge so to appoint a panel to hear a case or to assign a case for hearing such as was attempted by the Chief Judge in that case.

II.

This Court is, of course, a creature of statute. The statute providing for the assignment of Judges is 28 U.S.C. § 46:

> § 46. Assignment of judges; divisions; hearings; quorum
>
> "(a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.
>
> "(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

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[5] The order, as it appears in the file of the Stell case, is as follows:

"It is Ordered that the above entitled and numbered cause be assigned for hearing at Atlanta, Georgia on Friday, May 24, 1963 before a panel consisting of Judges Tuttle, Rives and Bell.

Elbert P. Tuttle
Chief Judge,
U. S. Court of Appeals

to be filed and entered as of 5/21."

[6] The panel before whom cases were being argued during the week beginning May 20th was the one sitting at Houston, Texas composed of Judges Hutcheson, Brown and Lumbard.

> "(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.
>
> "(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum."

The Supreme Court interpreted this statute in the case of Western Pacific Railroad Corporation et al. v. Western Pacific Railroad Company et al., 1953, 345 U.S. 247, 257-258, 73 S.Ct. 656, 661, 97 L.Ed. 986, confirming the language of the statute as having the literal meaning of the words used:

> "This interpretation makes for an harmonious reading of the whole of § 46. In this Section, Congress speaks to the Courts of Appeals: the court, itself as a body, is authorized to arrange its calendar and distribute its work among its membership; the court, itself, as a body, may designate the places where it will sit. Ordinarily, added Congress, cases are to be heard by divisions of three. But Congress went further: it left no doubt that the court, by a majority vote, could convene itself en banc to hear or rehear particular cases."

The Rules of this Court do not, as far as I can find, provide for the assignment of cases for hearing or for the assignment of judges by the Chief Judge or any one Judge.[6] *En banc* hearings are provided for in Rule 25a of

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[6] The only rules I can find relating to the assignment of cases and of Judges are Rules 35, 26 and 17:

"Rule 35. Assignment of Cases for Hearing

"1. Thirty days prior to the opening of a regular session of this court at Atlanta, Montgomery, Fort Worth, and Jackson-the Rules of this Court. I find no provision for advancement of cases or taking them up out of time either in the statutes or in our Rules or in the Federal Rules of Civil Procedure.[7]

From the foregoing, it follows, I think, that the judgment in the instant case should be reversed because the panel which decided it had no legal existence and the order setting it for hearing without a record and giving it other preferential treatment was entered without authority. It follows, moreover, that the judgment should be reversed because the precedents upon which it is grounded were not valid decisions of this Court.

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ville, and thirty days prior to the opening of the various sessions at New Orleans, the clerk is directed to assign cases returnable at said places that are ready for hearing in such manner as may be most convenient to expedite the business of the court.

"2. Any appeal returnable at Atlanta, Montgomery, Fort Worth, Jacksonville, or New Orleans may be assigned for hearing at any other place of holding court for a more prompt hearing, on consent of the parties or on motion of either party or on the court's own motion."

"Rule 36. Assignment of Judges

"It is ordered that whenever a full bench of three judges shall not be made up by the attendance of the Associate Justice of the Supreme Court assigned to the circuit, and of the circuit judges, so many of the district judges, as may be necessary to make up a full court of three judges, are hereby designated and assigned to sit in this court; provided, however, that the court may, at any time, by particular assignment, designate any district judge to sit as aforesaid."

"Rule 17. Docket

"The clerk shall enter upon a docket all cases brought to and pending in the court in their proper chronological order, and such docket shall be called at every term * * *."

[7] Rule 40, F.R.C.P. provides that precedence shall be given to actions entitled thereto by any statute of the United States.

III.

I think, too, that a solution of the problems facing this Court will be helped by a study of the handling of racial cases during the immediate past, in which period so much haste has been made and so many procedural innovations have been utilized that the general impression has grown up and has been expressed that this Court has one set of procedures covering racial cases and another set covering all other cases. I have accordingly made a study of the cases as they appear in the Federal Reporter, Second Series, involving controversies heard before panels of this Court bearing date within the two years preceding the hearing of the present case on June 26, 1963. I believe this survey to be correct. It covers twenty-five cases, which are listed in Appendix "A" to this opinion. Of the twenty-five cases listed, the majority of the panel in twenty-two of them was composed of some combination of The Four, who constitute a minority of the active Judges. In only two cases did two of the remaining five members of the Court sit together.

Of the Circuit Judges of this Circuit, The Four sat fifty-five times; the other five sat twelve times. The Four wrote twenty-three of the twenty-five opinions, including per curiams: Chief Judge Tuttle wrote six, including four per curiams; Judge Rives wrote six, including two per curiams; Judge Brown wrote four, and Judge Wisdom wrote six, including one per curiam. The per curiam order (Appendix "A", No. 21) adjudging Lieutenant Governor Johnson to be in civil contempt was entered by a panel consisting of Judges Rives, Brown and Wisdom, and one of them wrote the opinion. One per curiam was written by one of the five remaining Judges of this Court, and one full opinion was written by a district judge.

IV.

The handling by Chief Judge Tuttle of three-judge district courts in the State of Mississippi is a part of the picture of the crusading spirit which I think has been largely responsible for the errors here discussed and is relevant to the discussion of a solution of the problems before us. The statute providing for such courts is in these words:

> "§ 2284. Three-judge district court; composition; procedure
>
> "In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:
>
> "(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. *Such judges shall serve as members of the court to hear and determine the action or proceeding.* * * *" (Emphasis added.)

In the performance of the ministerial duty so imposed upon him, the universal practice, except in this Circuit in the last four years, has been for the Chief Judge to appoint the circuit judge resident in the State for which the district court is constituted and one of the district judges resident in such state as the other two members. I have been able to find no instance where this procedure has not been followed except those here mentioned.

The State of Mississippi has residing winthin its borders one Circuit Judge, three active District Judges, and one senior District Judge designated for active service, all of whom have been at all times mentioned citizens of Mississippi, qualified for the positions they hold, and ready, willing and able to perform the duties incident to service upon such a district court.

Since November 9, 1961 and prior to the submission of the instant case, three district courts of three judges have been constituted to hear racial cases in Mississippi.[8]

For the first of these, District Courts of the United States for the Southern District of Mississippi, Judges Tuttle, Rives and Mize were designated; for the second, Judges Rives, Brown and Mize were designated; and for the third, Judges Brown, Wisdom and Cox were designated. A member of The Four was substituted for the resident Circuit Judge in each instance, and another member of The Four was substituted for the additional District Judge. The idea that the Chief Judge may thus gerrymander the United States Judges of a State in order to accomplish a desired result is, I think, entirely foreign to any just concept of the proper functioning of the judicial process.

V.

If this Court is to regain the stature it owned on March 16, 1959 when Judge Hutcheson laid down the duties of Chief Judge it must, in my opinion, forsake the special procedures which have been discussed and adhere to those which are "time-tested" and legal. It is important, I think, that "the court as a body" on whom the responsibility rests take hold of the problem and solve it.

I, therefore, respectfully dissent. United States v. New York, New Haven & Hartford Railroad Co., 2 Cir., 1960, 276 F.2d 525; Puddu v. Royal Netherlands, Etc., 2 Cir., 1962, 303 F.2d 752; and Walters v. Moore-McCormack Lines, Inc., 2 Cir., 1963, 312 F.2d 893.

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[8] No. 3215, Jackson Division, Southern District, United States v. City of McComb, et al., order entered 11-9-61;

No. C-3235, Jackson Division, Southern District, Reverend Clark et al. v. Allen Thompson, Mayor, et al., order entered 1-23-62;

No. C-3312, Jackson Division, Southern District, United States v. State of Mississippi et al., order entered 9-5-62.

APPENDIX A

1. Dixon v. Alabama State Board of Education, Aug. 4, 1961, 5 Cir., 294 F.2d 150. Expulsion of students for demonstrating. Circuit Judges Rives, Cameron and Wisdom. Opinion by Judge Rives.

2. United States v. Wood, Oct. 27, 1961, 5 Cir., 295 F.2d 772. Voter registration. Circuit Judges Rives, Cameron and Brown. Opinion by Judge Rives.

3. Meredith v. Fair, Jan. 12, 1962, 5 Cir., 298 F.2d 696. School desegregation. Chief Judge Tuttle, Circuit Judges Rives and Wisdom. Opinion by Judge Wisdom.

4. Kennedy v. Bruce, Feb. 5, 1962, 5 Cir., 298 F.2d 860. Voter registration. Chief Judge Tuttle, Circuit Judges Rives and Wisdom. Opinion by Chief Judge Tuttle.

5. Stoudenmire v. Braxton, Mar. 9, 1962, 5 Cir., 299 F.2d 846. School desegregation. Chief Judge Tuttle, Circuit Judges Brown and Bell. Per curiam.

6. United States v. Lynd, April 10, 1962, 5 Cir., 301 F.2d 818. Voter registration. Chief Judge Tuttle, Circuit Judges Hutcheson and Wisdom. Opinion by Chief Judge Tuttle.

7. Christian v. Jemison, April 25, 1962, 5 Cir., 303 F.2d 52. Local transportation desegregation. Circuit Judges Rives, Brown and Wisdom. Opinion by Judge Wisdom.

8. State of Alabama v. United States, June 1, 1962, 5 Cir., 304 F.2d 583. Voter registration. Circuit Judges Rives, Cameron and Brown. Opinion by Judge Brown.

9. Meredith v. Fair, Feb. 12, 1962, 5 Cir., 305 F.2d 341. School desegregation. Chief Judge Tuttle, Circuit Judges Rives and Wisdom. Per curiam.

10. Meredith v. Fair, June 25, 1962, 5 Cir., 305 F.2d 343. School desegregation. Circuit Judges Brown and

Wisdom, District Judge DeVane. Opinion by Judge Wisdom.

11. Kennedy v. Lynd (and four other consolidated cases), July 11, 1962, 5 Cir., 306 F.2d 222. Voter registration. Circuit Judges Rives, Brown and Wisdom. Opinion by Judge Brown.

12. Meredith v. Fair, July 27, 1962, 5 Cir., 306 F.2d 374. School desegregation—recall of mandate, etc. Circuit Judges Brown and Wisdom, District Judge DeVane. Opinion by Judge Wisdom.

13. Guillory v. Administrators of the Tulane University of Louisiana, July 21, 1962, 5 Cir., 306 F.2d 489. School desegregation. Circuit Judges Cameron, Brown and Wisdom Per curiam.

14. Augustus v. Board of Public Instruction, July 24, 1962, 5 Cir., 306 F.2d 862. School desegregation. Chief Judge Tuttle, Circuit Judges Rives and Brown. Opinion by Judge Rives.

15. Nelson v. Grooms, Aug. 17, 1962, 5 Cir., 307 F.2d 76. School desegregation—mandamus. Circuit Judges Rives, Brown and Wisdom. Opinion by Judge Rives.

16. Bush v. Orleans Parish School Board, Aug. 6, 1962, 5 Cir., 308 F.2d 491. School desegregation. Circuit Judges Rives, Brown and Wisdom. Opinion by Judge Wisdom.

17. Stone v. Members of Board of Education, City of Atlanta, Ga., Nov. 16, 1962, 5 Cir., 309 F.2d 638. School desegregation. Chief Judge Tuttle, Circuit Judge Brown, District Judge Johnson. Per curiam.

18. Hanes v. Shuttlesworth, Nov. 16, 1962, 5 Cir., 310 F.2d 303. Park desegregation. Circuit Judges Rives, Jones and Bell. Per curiam.

19. Ross v. Dyer, Dec. 28, 1962, 5 Cir., 312 F.2d 191. School desegregation. Chief Judge Tuttle, Circuit Judges Hutcheson and Brown. Opinion by Judge Brown.

20. Potts v. Flax, Feb. 6, 1963, 5 Cir., 313 F.2d 284. School desegregation. Circuit Judges Brown and Bell, District Judge Simpson. Opinion by Judge Brown.

21. Meredith v. Fair (United States v. Mississippi and Paul B. Johnson, Jr.), Sept. 29, 1962, 5 Cir., 313 F.2d 534. Civil contempt. Circuit Judges Rives, Brown and Wisdom. Per curiam.

22. Clark v. Thompson, March 6, 1963, 5 Cir., 313 F.2d 637. Desegregation of public recreational facilities. Circuit Judges Hutcheson, Gewin and District Judge Hannay. Per curiam.

23. United States v. Dogan, Jan. 26, 1963, 5 Cir., 314 F.2d 767. Voter registration. Circuit Judges Rives and Wisdom, District Judge Bootle. Opinion by Judge Bootle.

24. City of Shreveport v. United States, 5 Cir., 1963, 316 F.2d 928. Airport desegregation. Chief Judge Tuttle, Circuit Judges Rives and Moore.* Per curiam.

25. City of Shreveport v. United States, 5 Cir., 1963, 316 F.2d 928. Bus terminal desegregation. Chief Judge Tuttle, Circuit Judges Rives and Moore.* Per curiam.

ADDENDUM TO APPENDIX A

Since the printing of this dissenting opinion by the Clerk on July 30, 1963, a less hurried examination of the published reports of cases decided during the period specified in the opinion has disclosed that four cases were inadvertently omitted from Appendix "A". These were called to the attention of the other Judges of this Court by my letter of August 14, 1963. They are not included in the computations dealt with in Part III of the opinion.

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* Of the Second Circuit, sitting by designation.

Following are the four omitted cases:

2½. Abernathy v Patterson, Oct. 31, 1961, 5 Cir., 295 F.2d 452. Enjoining "segregated" state courts. Circuit Judges Rives and Wisdom, District Judge Carswell. Opinion by Judge Rives.

7½. United States ex rel. Seals v. Wiman, May 30, 1962, 5 Cir., 304 F.2d 53. Exclusion of Negroes from state grand and petit juries. Circuit Judges Rives, Brown and Wisdom. Opinion by Judge Rives.

21½. Coleman v. Kennedy, Feb. 13, 1963, 5 Cir., 313 F.2d 867. Voter registration. Circuit Judges Rives and Wisdom, District Judge Bootle. Per Curiam.

23½. Greene v. Fair, Feb. 18, 1963, 5 Cir., 314 F.2d 200. School desegregation. Chief Judge Tuttle, Circuit Judges Jones and Bell. Per Curiam.

On Petition for Intervention and Stay

Before Wisdom, Gewin and Bell, Circuit Judges.

Gewin, Circuit Judge.

The Petition for Intervention and Stay of the operation of the plan of desegregation approved on August 19, 1963, by the United States District Court for the Northern District of Alabama is hereby denied. Morin v. City of Stuart, 5 Cir., 1939, 112 F.2d 585; Holland v. Board of Public Instruction of Palm Beach County, 5 Cir., 1958, 258 F.2d 730; St. Helena Parish School Board v. Hall, 5 Cir., 1961, 287 F.2d 376; McKenna v. Pan American Petroleum Corp., 5 Cir., 1962, 303 F.2d 778.

Under the original opinion and order of the U. S. District Court for the Northern District of Alabama[1] and under the opinion of this Court rendered in this cause on July 12, 1963, Negro children have the constitutional right and the statutory right under the Alabama Pupil Placement Law to make application for transfer and enrollment free of racial discrimination. The issues involved here have long been settled by decisions of the U. S. Supreme Court. Law and order cannot be preserved by yielding to violence and disorder, nor by depriving individuals of constitutional rights decreed to be vested in them by the U. S. Supreme Court. Cooper v. Aaron, 358 U.S. 1, 20, 78 S.Ct. 1401, 3 L.Ed.2d 5, 19 (1958).

We have no trouble in taking judicial notice of the fact that there are many upstanding, splendid, law-abiding citizens in Birmingham and throughout the State of Alabama who are so firmly dedicated to the principle of the orderly process of the courts and the law that they refuse to rebel against those laws which displease them. We also take judicial knowledge of the fact that violence and disorder have erupted in Birmingham. There is no indication that the great body of people of Alabama approve of lawless conduct even though such conduct arises out of the enforcement of laws which change customs and traditions. The question now is not approval or disapproval of the law; but whether the law, order, and the educational process will prevail over violence and disorder. The howling winds of hate and prejudice always make it difficult to hear the voices of the humble, the just, the fair, the wise, the reasonable, and the prudent. We must not permit their voices to be silenced by those who would incite mob violence. "The best guarantee of civil peace is adherence to, and respect for, the law." Watson et al. v. City of Memphis et al., 1963, 373 U.S. 526, 83 S.Ct. 1314, 1320, 10 L.Ed.2d 529.

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[1] In Judge Lynne's original opinion it was stated:

> "This Court will not sanction discrimination by them [the Superintendent and Board of Education] in the name of the Placement Law * * *"
>
> "Adequate time remains before the opening of the September, 1963, school term for the processing of applications for assignments or transfers in behalf of interested individuals. Jurisdiction of this action will be retained for the purpose of permitting the filing of such supplemental complaint, if any, as might be entitled to be presented, in case of any unconstitutional application of the Alabama School Placement Law against the plaintiffs, or others similarly situated, or of any other unconstitutional action on the part of defendants against them. The issues tendered by any supplemental complaint will be given a preferred setting on the docket of this court and will be heard on five days notice to defendants."

"Patience is a great part of justice,"[2] but we are bound by the most recent statement of the U. S. Supreme Court in Goss v. Board of Education of the City of Knoxville, Tennessee (a unanimous opinion) 1963, 373 U.S. 683, 83 S.Ct. 1405, 1409, 10 L.Ed.2d 632, wherein the Court stated:

> "In reaching this result we are not unmindful of the deep-rooted problems involved. Indeed, it was consideration for the multifarious local difficulties and 'variety of obstacles' which might arise in this transition that led this Court eight years ago to frame its mandate in Brown in such language as 'good faith compliance at the earliest practicable date' and 'all deliberate speed.' Brown v. Board of Education, 349 U.S., [294] at 300, 301 [75 S.Ct. 753, 99 L.Ed. 1083]. Now, however, eight years after this decree was rendered and over nine years after the first Brown decision, the context in which we must interpret and apply this language to plans for desegregation has been significantly altered."

The writer of this opinion wishes to state that it has been and is now his feeling that the opinion of the U. S.

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[2] "Handbook for Judges" edited by Donald K. Carroll, American Judicature Society.

District Court for the Northern District of Alabama as originally entered in this cause should have been affirmed for the following reasons:

1. The same was in full compliance with the decisions of the U. S. Supreme Court and of this Court.

2. The District Judge being a resident of the area involved is better qualified to consider and deal with "* * * the multifarious local difficulties and 'variety of obstacles' which might arise in this transition."[3]

Under the opinion of the District Court for the Northern District of Alabama originally entered in this case; the opinion of the majority and the dissenting opinion released on July 12, 1963 by this Court; the opinion in Shuttlesworth v. Birmingham Board of Education, N.D. Ala.1958, 162 F.Supp. 372; the Supreme Court cases herein cited; and numerous other decisions of the U. S. Supreme Court and the various Circuit Courts of Appeal, the rights of the plaintiffs and those similarly situated to attend the schools which have been designated for their attendance is clear and unequivocal. Court orders, like constitutional rights, cannot yield to violence. In the present status of this case the Board of Education of the City of Birmingham, the present members of the Board and Theo R. Wright, Superintendent of Schools, their successors, etc. must comply with the plan of desegregation approved by the U. S. District Court for the Northern District of Alabama on August 19, 1963, in this cause.

A solution may be found in the following pronouncement by Mr. Justice Frankfurter in his concurring opinion in Cooper v. Aaron, supra:

> "By working together, by sharing in a common effort, men of different minds and tempers, even if they do not reach agreement, acquire understanding and thereby tolerance of their differences."

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[3] See Goss v. Board of Education of the City of Knoxville, Tennessee, supra.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Sept. 24, 1963.

CAROLYN ELEANOR HARRIS, a minor, by TAYLOR HARRIS, her guardian and next friend, et al., *Appellants-Intervenors*,

v.

LINDA SUE GIBSON and BRENDA GIBSON, minors, by THOMAS L. GIBSON, their father and next friend, and THOMAS L. GIBSON, individually, et al., *Plaintiffs-Appellees*,

and

GLYNN COUNTY BOARD OF EDUCATION, a public body existing under the laws of Georgia, et al., *Defendants-Appellees*.

No. 20871.

Constance Baker Motley, New York City, Donald L. Hollowell, Horace T. Ward, Atlanta, Ga., for appellants.

Carter Pittman, Dalton, Ga., Geo. L. Leonard Washington, D. C., B. N. Nightingale, Brunswick, Ga., Barrie L. Jones, Alma, Ga., Alan B. Smith, Brunswick, Ga., for appellees.

Before RIVES, BROWN, and BELL, Circuit Judges.

GRIFFIN B. BELL, Circuit Judge.

The minor appellants are six Negro children presently enrolled in the public schools of Glynn County, Georgia. An application for transfer from the Negro high school to Glynn Academy, the white high school in Glynn County on behalf of each minor appellant, some to the eleventh and some to the twelfth grades, was granted by the appellee Board of Education for the 1963-64 school year which commenced on August 28, 1963. On August 27, 1963, the appellee-plaintiffs secured from the United States District Court for the Southern District of Georgia a temporary restraining order, without notice, enjoining the appellee Board of

Education from permitting the transfers. On September 6, 1963 that court entered an order styled a "pretrial order", the effect of which was to continue the temporary restraining order in force to the end of preventing the transfers. Because of this action of the District Court the Board of Education has been prevented from going forward with its voluntary plan of desegregation.

The "pre-trial" order of September 6, 1963, was, in effect the granting of a preliminary injunction. Our jurisdiction in this regard is based on 28 U.S.C.A. § 1292. *Sims* v. *Greene*, 3 Cir., 1947, 160 F.2d 512. See also *Missouri-Kansas-Texas R. Co.* v. *Randolph*, 8 Cir., 1950, 182 F.2d 996. We have the power to grant any necessary relief to prevent irreparable damage to the minor appellants. Title 28 U.S.C.A. § 1651. The "pre-trial" order is also a final order within the meaning of 28 U.S.C.A. § 1291 in that it determines substantial rights of the six minor Negro children, and these rights will be irreparably lost if relief is delayed pending final judgment. See *United States* v. *Wood*, 5 Cir., 1961, 295 F.2d 772, 778; cert. den., 369 U.S. 850, 82 S.Ct. 933, 8 L.Ed.2d 9; *Kennedy* v. *Lynd*, 5 Cir., 1962, 306 F.2d 222, 228; *Hodges* v. *Atlantic Coast Line Railroad Co.*, 5 Cir., 1962, 310 F.2d 438, 443.

Under the school segregation cases, *Brown* v. *Board of Education*, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873; 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083; *Cooper* v. *Aaron*, 1958, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5, the irreparable damage being sustained by appellants consists of being forced to attend a racially segregated school. No comparable injury will be suffered by the appellee-plaintiffs if the motion for injunction pending appeal is granted. This court is of the opinion that there is a strong probability that the appellant-intervenors will ultimately prevail on this appeal on the merits although that question is not now decided.

It follows from what we have said that an injunction pending appeal should be granted. This will also solve the dilemma of the School Board, caught as it is between its own voluntary plan and the preventative order of the District Court, as expressed in their request for direction. To the end that the handling of the matter be restored to local school authorities, see *Calhoun v. Latimer*, 321 F.2d 302 decided by this court on June 17, 1963, the orders heretofore issued by the District Court as they prohibit these transfers are vacated, and following the procedure outlined in this court's decision in *Stell, et al. v. Savannah-Chatham County Board of Education, et al.*, 5 Cir., 1963, 318 F.2d 425, 428, it is ordered that the District Court for the Southern District of Georgia enter the following judgment and order:

> "The defendant-appellees, Glynn County Board of Education, a public body existing under the laws of Georgia; W. A. Whittle, Chairman of the Glynn County Board of Education, A. M. Harris, Jr., S. K. Singletery, G. M. Baumgardner, James Gilbert, Dr. H. L. Moore, D. O. McCook, Jr. C. M. Ellzey, and Edward Drawdy, as members of the Glynn County Board of Education and Ralph Hood, Superintendent of Schools of Glynn County, their agents, servants, employees, successors in office and those in concert with them who shall receive notice of this order be, and they are hereby restrained and enjoined from refusing to admit, enroll or educate the said six minor appellants in the Glynn Academy in the school year 1963-1964 from and after the opening of school on Monday, September 16, 1963."

This order shall remain in effect until the final determination of the appeal of the within case in the Court of Appeals for the Fifth Circuit on the merits, and until further order of this court.

The Clerk is directed to issue the mandate forthwith.

Filed May 13, 1963.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF GEORGIA, SAVANNAH DIVISION.
CIVIL ACTION No. 1316

RALPH STELL, a minor by L. S. STELL, JR., his father and
next friend, et al., *Plaintiffs*,

v.

SAVANNAH-CHATHAM COUNTY BOARD OF EDUCATION,
ET AL., *Defendants*,

and

LAWRENCE M. ROBERTS and DANIEL ROBERTS, Minors, by
ADRIENNE M. ROBERTS, their mother and next friend, et al.,
Interveners.

PRELIMINARY FINDINGS AND CONCLUSIONS

This is a school desegregation case in which plaintiffs ask a mandatory injunction requiring total integration of the schools administered by the defendants. Interveners were made parties by the Court to be heard on the predicted injuries to white and negro pupils if the relief demanded in the complaint were to be granted.

The plaintiffs alleged injury to themselves and others of their class from the existing separation of white and negro schools in Savannah-Chatham County but did not offer proof in support of this allegation, contending rather that this Court must conclusively presume such injury as a matter of law from the findings of fact made by the Supreme Court on the four factual situations brought before it in *Brown* v. *Board of Education*, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873.

Interveners denied that the existing school assignment system caused injury to either white or negro pupils but that serious injury would be suffered by students of both races if the relief sought by plaintiffs were to be granted. Interveners submitted on these points the expert testimony of sociologists, psychologists, educators and anatomists, each of whom was conceded by plaintiffs to be an authority in his field. The opinions expressed by these witnesses were further supported in the record by publications and studies either marked in evidence or read into the record. Plaintiffs offered no witnesses or authorities in rebuttal, maintaining that whether any educational or psychological injury would result to the students of either race from compulsory integration was irrelevant.

The defendant School Board took no position during the hearing as between plaintiffs and interveners except as stated by its counsel in open Court on May 13th—at the conclusion of the case.

Plaintiffs requested early trial in order that any relief may be made available by the Fall school term and the Court accordingly specially calendared and tried the issues on May 9, 10 and 13th.

In response to plaintiffs' further request for an early ruling herein the following findings of fact and conclusions of law under Rule 52 of the Federal Rules of Civil Procedure are made on a preliminary basis. The Court will issue its formal opinion and final findings within the next thirty days.

I.

FINDINGS.

The Parties.

1. The minor plaintiffs are negro students in the primary or secondary public schools of Savannah-Chatham County. The minor interveners are white students in the primary or secondary white schools of Savannah-Chatham County. The defendant Board of Education and the individual defendants are in control of and administer the primary and secondary public schools in Savannah-Chatham County

and have the necessary authority to place in effect any orders of this Court with respect thereto.

The Schools.

2. The Primary and secondary public schools of Savannah-Chatham County are divided into schools for white pupils and schools for negro pupils and admission thereto is limited to applicants of the respective races. The evidence does not show any application of any negro to schools operated for whites.

3. The teaching and administrative staffs of the white and negro schools are white and negro respectively up to and including the direct assistants to the Superintendent of Schools. Principals of both negro and white schools are part of the Superintendent's staff and participate in the adaptation of their particular schools to pupil requirements and the educational effectiveness of the several part [sic] of the school system. The schools are equal in all respects except as to a slight advantage in favor of the negro teaching staff in terms of graduate training and salaries. The same total curriculum is made available to all schools. Responsiveness to the aptitudes and needs of the pupils in each is secured by arranging a choice of elective subject [sic] to be selected by the school on the basis of student request and guidance counseling.

Student Test Grouping.

4. All pupils in three significant grades of the Savannah-Chatham County school system have been tested annually since 1954 for psychometric intelligence and correlative academic achievement through a battery of nationally accepted tests administered by local personnel, supervised and processed by the University of Georgia. This program was initiated prior to May, 1954 at the request of the Superintendent of Schools for Savannah-Chatham County as part of a comprehensive study of mental growth and school

achievement for pupil placement and course selection and content recommendations. The result of this testing program has been considered by the Savannah-Chatham County Board of Education in arranging school curricula responsive to the abilities and learning characteristics of the two student groups.

5. The psychometric test results have conclusively demonstrated that the differences between white and negro students in learning capabilities and school performance vary in increasing degree from the pre-school period through the completion of high school. The differences between white and negro students were consistent on all types of tests and increased with chronological age at a predictable and constant rate. The negro overlap of the median white scores dropped from approximately 15% in the lowest grades to 2% in the highest and indicated that the negro group reached an educational plateau approximately four years before the white group. When a special control group was selected for identity of age and intelligence quotient in the lower grades, the negro students lagged by two to four years when the entire group reached the 12th grade.

6. The tests covered general intelligence, reading and arithmetic achievement, and mental maturity. On the last, the white average was 20 points above the negro average. The achievement tests showed major ability pattern differences. On reading comprehension and arithmetic fundamentals there was virtually no overlap between the two groups.

Basis of Test Variations.

7. These differences in test results in Savannah-Chatham County are not the result of the educational system or of the social or economic differences in status or in environment of the students. These test results agree on a point for point basis with substantially identical results obtained

from similar tests made in other areas of this country and abroad and in both segregated and integrated situations. Additionally, quantitative and qualitative distinctions in the Savannah-Chatham and other test results have shown the same variation in learning rates between the two ethnic groups even after the socio-economic factors of the test students had been equated.

8. All the evidence before the Court was to the effect that the differences in test results between the white and negro students is attributable in large part to hereditary factors, predictably resulting from a difference in the physiological and psychological characteristics of the two races. The evidence establishes and the Court so finds that of the twenty-point difference in maturity test results between negro and white students in Savannah-Chatham County a negligible portion can be attributed to environmental factors. Furthermore no evidence whatsoever was offered to this Court to show that racial integration of the schools could reduce these differences. Substantially all the difference between these two groups of children is inherent in the individuals and must be dealt with by the defendants as an unchangeable factor in programming the schools for the best educational results.

Group Integration.

9. The students in Savannah-Chatham County schools are 60% white, 40% negro. A school class mixed on this basis would have a median progress rate 12 points below that of the former white class, and 8 points above the progress rate of the comparable former negro class. Two thirds of the negro students would fail in this situation, particularly in the upper grades. This would place in the same schoolroom negro students two to four years older in chronological age than the white students. White students in such a class lose any challenge to further academic accomplishment.

10. Failure to attain the existing white standards would create serious psychological problems of frustration on the part of the negro child, which would require compensation by attention-creating antisocial behavior. In other cities this effect has created serious discipline problems for the teachers and school administrators with consequent loss of schooltime. In New York 37% of negro truants questioned in a study stated that they had run away from home because of failure to keep up in school.

11. The congregation of two substantial and identifiable student groups in a single classroom, under circumstances of distinct group identification and varying abilities would lead to conflict impairing the educational process. It is essential for an individual to identify himself with a reference group for healthy personality development. Physical and psychological differences are the common basis of group identification, indeed they compel such self-identification. To increase this divisive tendency, it has been established without contradiction, that selective association is a universal human trait; that physically observable racial differences form the basis for preferential association and that patterns of racial preference are formed and firmly established at a pre-school age.

12. The effects of intergroup association are reasonably predictable on the basis of that branch of psychology known as social dynamics. In the case of two identifiable groups in the same classroom, intergroup tensions and conflicts result. These become substantial when the groups have a high identification index in a situation where the difference between them is as great as that existing between white and negro children in the Savannah-Chatham County schools.

13. In each city referred to in the evidence where large scale integration had taken place or had existed continuously, the predicted level or even a greater degree of conflict

existed and substantially impaired the efficacy of the entire educational system.

14. Total group integration as requested by plaintiffs would seriously injure both white and negro students in the Savannah-Chatham County schools and adversely affect the educational standards and accomplishments of the public school system.

Selective Integration.

15. Throughout the trial, counsel for plaintiffs emphasized the conceded ability of certain superior negro children to meet the progress norms of the white classes and implied that at least selective transfers of such students to white schools would not cause injury similar to the effects of group integration. The Court finds that such selective integration would cause even greater psychological harm to the individual negro children involved and to the balance of their group.

16. Negro children so transferred would not only lose their right of achievement in their own group but would move to a class where they would be inescapably conscious of social rejection by the dominant group. Such children must try to identify themselves with the white children while unable to free themselves from continuing identification with other negro children. Additionally, the children involved, while able to maintain the rate of the white class at first, would, according to all of the test results, thereafter tend to fall further back in each succeeding term.

17. The effects on the remaining negro children would be even more injurious. The loss of the better group members would greatly increase any existing sense of inferiority. The competitive drive to educational accomplishment for those not transferred would be taken away. The Court finds that selective integration would cause substantial and irremovable psychological injury both to the individual transferee and to other negro children.

Segregation Injury.

18. Plaintiffs assumption of injury to negro students by the continuance of segregated schools is not supported by any evidence in this case. Whatever psychological injury may be sustained by a negro child out of his sense of rejection by white children is increased rather than abated by forced intermixture, and this increase is in direct proportion to the number and extent of his contacts with white children.

19. Each study presented to the Court, confirmed by the opinions of the witnesses showed that the damaging assumptions of inferiority increase whenever the child is brought into forced association with white children. The principal author of the studies relied on by the Supreme Court in the Brown case, used students from integrated schools in Northern states in getting the race rejection results which were then cited as showing such effects occurring from segregation. Moreover, the same author in an earlier study came to the conclusion that compulsory intermixture rather than racial separation in school was the principal source of the damaging loss of race identification.

20. The adverse effects of compulsory congregation are particularly harmful in the early formative school years. Interveners' witnesses noted that integration at the collegiate level is not only possible but on a voluntary basis might be of advantage to both white and negro students. The findings herein are accordingly limited to children of primary and secondary school ages.

II.

Conclusions.

1. The white and negro school children have equivalent rights before this Court, and are equally entitled to be considered in determining the scope and content of constitutional rights.

2. A reasonable classification within the meaning of the equal protection clause of the Constitution would be one which secures the maximum result in the educational process for all students and the minimum injury to any.

3. The classification of children in the Savannah-Chatham County schools by division on the basis of coherent groups having distinguishable educability capabilities is such a reasonable classification.

This 13th day of May, 1963.

F. M. Scarlett,
United States District Judge.

ORDER AND DECREE.

Filed May 13, 1963.

(Title Omitted.)

1. The injunction prayed for by the plaintiffs in this case is denied.

2. Upon good cause shown by plaintiffs or interveners, the Court will further direct herein that defendants shall conduct the next annual test of children in the Savannah-Chatham County schools under such conditions as plaintiffs or interveners may reasonably request in order to insure complete impartiality of result.

3. No costs are awarded to any party as against the other.

This 13th day of May, 1963.

F. M. Scarlett,
Judge, U. S. District Court,
Southern District of Georgia.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT ALABAMA, S. D.

BIRDIE MAE DAVIS et al., *Plaintiffs*,

v.

BOARD OF SCHOOL COMMISSIONERS
OF MOBILE COUNTY, ALABAMA,
et al., *Defendants*.

CIV. A. No. 3003-63

June 24, 1963.

Jack Greenberg, Constance Baker Motley, Derrick A. Bell, Jr., New York City, Vernon Z, Crawford, Clarence E. Moses, Mobile, Ala., for plaintiffs.

Pillans, Reams, Tappan, Wood & Roberts, Mobile, Ala., Joseph F. Johnston, Birmingham, Ala., for defendants.

Daniel Holcombe Thomas, District Judge.

This cause was submitted on plaintiffs' motion for a preliminary injunction, directing defendants to present for approval of the court, within a period to be determined by the court, a plan for the reorganization of the entire school system of Mobile County, Alabama, into a unitary non-racial system.

The motion purportedly sought relief in the alternative, but the first alternative prayed permanent relief "upon the conclusion of the trial" and hence did not seek interlocutory relief.

The complaint and motion in this case were filed on March 27, 1963. On April 25, plaintiffs urged the granting of the motion and suggested, in open court, without previous notice, thirty days as the period of time to be determined by the court in which defendants should be ordered to submit a plan for the reorganization of the Mobile County School system. The court took the motion under submission on that date, and directed the parties to file briefs within designated times. The court's action in this matter was appealed by plaintiffs, and the appeal was dismissed by the Court of Appeals by order dated May 24, 1963.

For the reasons stated below, the motion is denied as to the specific relief requested, requiring the presentation of a plan within thirty days. However, an interlocutory order will be entered which will assure the protection of the rights of the plaintiffs.

Based upon the affidavits filed by plaintiffs and respondents and on facts of which the court takes judicial notice, the court makes the following findings of fact.

FINDINGS OF FACT

1. The Mobile County School System is administered by the Board of School Commissioners of Mobile County, a five-man Board. The professional staff is under the direction of a County Superintendent of Education and his several Assistant Superintendents, each being in charge of a particular phase of Board activities.

2. During the school year 1962-63, there were 89 schools in the Mobile County School system, accommodating a pupil load of approximately 75,000 pupils. More than 2,370 teachers are employed in addition to 105 non-teaching school principals and assistants. More than 200 public school busses are operated by the Board in the transportation of school children in Mobile County.

3. The schools of Mobile County are, and have been since the end of World War II, seriously overcrowded. During this period, the pupil load has doubled. Forty-two percent of the increase in the number of pupils in the State of Alabama since 1940, has occurred in Mobile County. The average annual pupil increase has been 3,000.

4. As a result of the rapid growth of the school population, a building program sufficient to house properly the students fell five years behind. As a consequence, it was

necessary to institute half-day or "double" sessions, the number of pupils in double sessions amounting to as many as 14,000 at one time.

5. In an effort to accommodate the pupil load, the School Board has engaged in an accelerated building program, and as a result the physical facilities are gradually overtaking the deficit. The administrative staff of the School Board has employed careful planning to utilize the space available, and throughout this period has resorted to the transportation of pupils from crowded schools nearer their homes to more distant schools where less crowded conditions existed. Many wooden portable classrooms have been constructed and utilized at the more crowded schools. As a result of these efforts, the number of pupils in double sessions has gradually decreased over the years.

6. Fourteen new schools, with more than three hundred rooms, are under construction or are about to be commenced, designed for occupancy in September of 1964. At that time, for the first time since World War II, it is probable that no student within the system will be in double-session classes. However, double sessions must continue through the school year 1963-64.

7. In normal years, in the Mobile County School System, the planning for a school term commences in March before the term beginning in September. The Board of School Commissioners of Mobile County followed the stated practice, and the planning for the session 1963-64 began in March of 1963.

8. Planning by the School Board staff consists of an ascertainment of pupil load based upon careful estimates and formulae derived from the experience of past years. The gross pupil load for each school is then broken down into class-by-class figures which are furnished to the Assistant Superintendents. Based upon these figures, classes are organized and pupils assigned thereto; the curriculum is

established for each school; necessary supplies are determined and ordered; class-room teachers are assigned, involving in many cases individual transfers; and school busses are allocated and routed.

9. The registration of the first-grade pupils for the term 1963-64 was accomplished before the end of the last preceding school term. Each registrant was placed in a class, and teacher assignments made.

10. Substantially all of the planning for the 1963-64 school session has already taken place, and most of the necessary administrative details have been accomplished. Teachers and the administrative personnel of the various schools have largely departed the area for additional professional schooling, or are on vacation, or in other summer employment.

11. Any major re-allocation of pupils, as would be required in a general desegregation process, would require the abandonment of planning already accomplished and the evolving of new plans. Such planning would be more difficult of accomplishment than a normal plan in that the administrative personnel would be without knowledge of pupil distribution, and the formulae evolved in normal years would be inappropriate. Many administrative details already accomplished would require cancellation. It would be necessary that administrative and teaching personnel be available for consultation and study of the problems peculiar to each of the schools involved. Many of these personnel are unavailable.

12. Teaching personnel would have to be re-assigned in many instances. In the realm of teacher assignment and transfer, many human difficulties exist. Consideration of community needs must be co-ordinated with consideration of individual teacher qualifications and personality. It would be necessary to ascertain the qualifications of each teacher to be assigned to desegregated schools.

13. By reason of limited physical facilities, personnel problems, and administrative commitments, it is not now nor has it been since the hearing of the motion, reasonably possible to reorganize the school system of Mobile County within such time as to affect the school year 1963-64.

14. The applications by the individual student plaintiffs for transfer to Baker High School during January 1963, were denied for valid administrative reasons.

Opinion.

Under the circumstances disclosed by the findings of fact, it is clear that the motion for interlocutory relief cannot be granted as a practical matter, independent of other considerations. The radical revision of school attendance areas and other far-reaching administrative changes in the city-county school system contemplated by the motion, simply cannot be managed within the time available. It is very doubtful that it could have been managed within a period of four to six months, even if all teachers and other administrative personnel were available for the entire time, which they are not. It is certain that no such order could now be made effective in the absence of every element which would be essential to its success—time, people, and, in all probability, money.

No plan or basis for general rearrangement of an entire local school system should be required by this or any court without affording to both the school authorities and the public ample time for consideration and discussion of alternatives. The arbitrary, hasty, and premature imposition of a plan would defeat the intended purpose and would create confusion, and impair the educational process for all pupils.

That it is impossible to predict what specific plan would be required upon the final outcome of this case, is made plain by the decision of Judge Lynne for the Northern District of Alabama in *Armstrong v. Birmingham Board of Education*, 218 F.Supp. 860. That decision was filed on May 28, 1963, after the submission of this motion. It holds, following the decision upholding the validity of the Alabama school placement and related laws by the Supreme Court of the United States in *Shuttlesworth v. Birmingham Board of Education*, 358 U.S. 101, 79 S.Ct. 221, 3 L.Ed.2d 145 (1958), that the principle of the Brown case can be fairly and adequately applied by the school authorities through the processing of applications pursuant to the State laws, and that any denial of constitutional rights in the handling of such applications can be corrected by the District Court on motion or by other proper proceeding.

Although the Armstrong decision would not necessarily be controlling here after final hearing, it does furnish a sound and appropriate basis for rejecting the notion that the sweeping reorganization proposed by the motion is now necessary for plaintiffs' protection.

The Fifth Circuit Court of Appeals, 318 F.2d 63, in its *per curiam* opinion in this case, handed down on May 24, 1963, had this to say: "The Supreme Court in the second Brown case [*Brown v. Board of Education of Topeka*], 1955, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, and in *Cooper v. Aaron*, 1958, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5, wisely left an area of discretion in the desegregation process in the District Courts, feeling that they were close to the local problems, and to school officials, and the children involved."

In line with this, I feel compelled to state here that this court ordered the desegregation of the municipal golf course in Mobile on the 13th of March 1961. That case had been held under advisement for fourteen months. The opinion was written long prior to its release. The time of release was chosen by the court as being opportune, and evidently it was. There has been no incident on the golf course since its integration.

This court took under submission on July 25, 1961, motions to dismiss in the desegregation case involving the facilities of the Mobile Municipal Airport. On October 3, 1961, the motions were denied. The case is still pending, but will be dismissed as moot. The Airport facilities have long since been integrated. The court, close to the community and its problems, believed that this would come about voluntarily and without the necessity of judicial enforcement. Relying upon this belief proved providential. There has not been the first incident.

There is now pending in this court a case for the desegregation of the City Bus Lines for the City of Mobile. The City Bus Lines have long since been integrated. There have been no incidents, though the court has never ruled on this case. This case, at the appropriate time, will also very likely be dismissed as moot, though there is one city ordinance which must either be repealed or be stricken down by the court.

The libraries in the City of Mobile have long since been integrated, though no case was ever filed for their integration. Many drugstore lunch counters in Mobile are integrated, and many chainstore lunch counters have been integrated, though no suits have been filed.

Mobile is perhaps the most desegregated city in the South, with no unfortunate incidents. If and when the appellate courts are called upon to pass on the procedure which the District Court here outlines, is it too much to ask that they be mindful of that "area of discretion in the desegregation process to the District Courts," left by the Supreme Court in the second Brown case, and approved as wise by the Court of Appeals for this Circuit in the instant case? If so, this court has every reason to believe that the mandate of the court will be honestly, conscientiously, and fairly carried out with the least possible, if not complete absence of, unfortunate incidents.

The specific relief prayed for in the motion will be denied. The case will be set for trial on the 14th day of November 1963. Consideration of the motion to dismiss, filed by the defendants, will be reserved until the trial of the cause. Defendants will be granted twenty days from the date of this order to file an answer.

In addition to any other relevant evidence which defendants may choose to offer, they will be directed to prepare and present at the trial a specific plan for the operation of the schools of Mobile County on a racially nondiscriminatory basis, consistent with the principles established by the Supreme Court, to commence at the beginning of the 1964-65 school year.

Entered this the 24th day of June 1963.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT ALABAMA, S. D.

DWIGHT ARMSTRONG et al., *Plaintiffs*,

v.

THE BOARD OF EDUCATION OF THE CITY OF BIRMINGHAM, JEFFERSON COUNTY, ALABAMA, et al., *Defendants*.

AGNES NELSON AND OSWALD NELSON, Minors, etc., *Plaintiffs*.

v.

THE BOARD OF EDUCATION OF THE CITY OF BIRMINGHAM, JEFFERSON COUNTY, ALABAMA, et al., *Defendants*.

CIV. A. Nos. 9678, 10188.

May 28, 1963.

W. L. Williams, Jr., Birmingham, Ala., and Ernest D. Jackson, Sr., Jacksonville, Fla. for plaintiffs.

J. M. Breckenridge City Atty., Cabaniss & Johnston, Joseph F. Johnston, Lange, Simpson, Robinson & Somerville, Reid B. Barnes and Ormond Somerville, Birmingham, Ala., for defendants.

LYNNE, District Judge.

When the Armstrong case (C.A. 9678) was called for trial on October 3, 1962, plaintiffs in the Nelson case (C.A. 10,188) moved for an order of consolidation or joint trial. Since it appeared that these actions involved common questions of law and fact the court entered an oral order consolidating them for purpose of trial only and expressly provided therein that all evidence offered and all objections thereto on any grounds made by any party would be deemed to have been offered and made in each case separately.

Resting jurisdiction upon 28 U.S.C.A. § 1343(3) and proceeding under 42 U.S.C.A. § 1983, plaintiffs in each case brought a class action against defendants essentially to enjoin them from continuing their policy, practice, custom and usage of operating a compulsory biracial school system in the City of Birmingham.

By stipulation of all counsel of record each case was submitted for the judgment of the court upon the prayer for final injunctive relief upon the pleadings and the proof. While written answers in behalf of defendants had not been filed in the Nelson case it was orally stated that their answers in the Armstrong case tendered all relevant issues except for the insistence that plaintiffs in the Nelson case had no standing to maintain their action for vindication of their individual rights or to represent a class.

Faced with this threshold question, the court directed that evidence first be offered relating to the status of the Nelson children, Agnes and Oswald, of the ages of sixteen and twelve, respectively. Consisting entirely of the testimony of their father, Reverend T. N. Nelson, careful consideration thereof results in the finding of the court that each of such children had departed Birmingham for Detroit several weeks before the filing of the complaint in their behalf; that throughout the trial they were living there with their sister and attending the public schools of Wayne County, Michigan, and that there is no reasonable probability of their return to Birmingham.

Since the father has no standing to sue for the deprivation of the civil rights of his children, *Brown* v. *Board of Trustees of LaGrange Ind. Sch. Dist.*, 187 F.2d 20 (5th Cir. 1951) and the children, recognized as the real parties plaintiff, were not at the time of the filing of the complaint and are not now pupils in or affected by the public school system of Birmingham, it follows that neither has shown an injury to himself and that neither has standing to represent the class. *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U.S. 151, 35 S.Ct. 69, 59 L.Ed. 169 (1914); *Doremus* v. *Board of Education*, 342 U.S. 429, 432, 72 S.Ct. 394, 96 L.Ed. 475 (1952);

Bailey v. *Patterson*, 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed. 2d 512 (1962); *Conley* v. *Gibson*, 29 F.R.D. 519 (S.D. Texas, 1961).

Therefore, a separate order will be entered in the Nelson case vacating the consolidation and dismissing the action for plaintiffs' lack of standing to sue without prejudice, however, to their right to intervene or file a supplemental complaint in the Armstrong case in the event of the return of either to Birmingham, as will hereinafter more fully appear.

With respect to standing to complain, matters stand differently in the Armstrong case. Although it was stipulated at the trial that the Shuttlesworth children, Ruby Fredericka and Fred L. Jr., and Carolyn Nash are no longer in the Birmingham public school system and do not intend to return thereto, it is undisputed that the Armstrong children, Dwight, Denise, James, Jr. and Floyd, have continuously been and are presently enrolled in such system. They have an equitable right to maintain this suit as a class action.

Plaintiffs rely upon undisputed facts in the record which are reproduced in capsulated form. The white population of Birmingham is 205,620; the Negro, 135,627. There are 8 high schools designated "White" with 409 teachers and 10,081 pupils; 5 high schools designated "Negro" with 278 teachers and 6,748 pupils; 50 elementary schools designated "White" with 781 teachers and 29,578 pupils; 42 elementary schools designated "Negro" with 697 teachers and 26,967 pupils. Never at any time has a Negro pupil been assigned or transferred to a school designated "White" or a white pupil to a school designated "Negro". Without exception white instructional personnel have been assigned only to schools designated "White" and Negro instructional personnel only to schools designated "Negro". White schools are located with reference to the concentration of white population and Negro schools with reference to the concentration of Negro population. There are overlappings in the geographical areas involved wherein there are white schools in closer proximity to the residences of Negro pupils than Negro schools. The reverse situation obtains with respect to white pupils. Notwithstanding, the custom, usage and practice historically followed, sanctioned and expected by Superintendent and Board to be followed presently, result in white pupils attending white schools and Negro pupils Negro schools.

To summarize, it graphically appears from the testimony of Dr. Theo R. Wright, Superintendent of Birmingham Public Schools, that he and the Birmingham Board of Education have operated a segregated school system based upon race in the past, are doing so now, and have formulated no plans to discontinue such an operation.

For their part, the real defendants, Superintendent and Board, advert to the allegation of the complaint that "the plaintiffs herein have not exhausted the administrative remedy [sic] provided by the Alabama School Placement Law"[1] and point to the uncontroverted evidence in this record that at no time has any Negro child, or anyone authorized to act in his behalf, applied for enrollment in or transfer to any school designated "White" and pursued the remedies afforded by such statute. Their reluctance to take the initiative in bringing about the integration of the public schools stems from something more than blind adherence to tradition. There is undisputed evidence in this record that there is a "very strong opposition" on the part of "citizens of all races" to the mixing of the different races in the schools. In addition, all witnesses who have been intimately associated with the operation of the local system over the period of many years expressed the opinion that indiscriminate mixing of the races would create many problems that would be detrimental to the interests of both groups, predicting the results of such a procedure by the use of adjectives ranging from "chaotic" to "catastrophic".

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[1] Code of Ala., tit. 52, § 61(1) et seq.

Charts, representing the results of Kuhlmann-Anderson Tests administered to pupils upon entering the first grade, California Mental Maturity Tests, Stanford Achievement Tests, and California Achievement Tests, all administered without reference to pending litigation, comparing the performances of white and Negro pupils in the same grade groups, were received in evidence as relevant to the contention of defendants that there are distinct differences in the *average or mean* mental abilities of the two groups which they are obliged to take into account in maintaining a sound educational program.

Of course the starting point in any school segregation case must be *Brown* v. *Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), the implementing decree of the court, *Brown* v. *Board of Education*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955), and its reinterpretive opinion in *Cooper* v. *Aaron*, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed. 2d 5, 19 (1958). The basic premise of the court was expressed in simple, uncomplicated language: "Separate educational facilities are inherently unequal." From it there flowed freely and naturally the enunciation of the constitutional principle: "Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." 347 U.S. at page 495, 74 S.Ct. at page 692.

Insofar as the opinions of experts in the fields of psychology and anthropology, in deposition, book and pamphlet form, may constitute an attack upon the major premise of the court, they are rejected out of hand. It would be supererogation to labor the obvious, that this court is bound by the opinions and judgments of the Supreme Court.

But the problem does not end there, for district courts have been invested with and are expected honestly and fairly to exercise discretion in the enormous task of desegregating public schools. The course which the court should follow was staked out in its opinion in *Shuttlesworth v. Birmingham Board of Education*, 162 F.Supp. 372, 384 (N.D. Ala.1958) wherein Judge Rives, as its organ, concluded with the pithy statement:

> "All that has been said in this present opinion must be limited to the constitutionality of the law *upon its face*. The School Placement Law furnishes the legal machinery for an orderly administration of the public schools in a constitutional manner by the admission of qualified pupils upon a basis of individual merit without regard to their race or color. We must presume that it will be so administered. If not, in some future proceeding it is possible that it may be declared unconstitutional in its application. The responsibility rests primarily upon the local school boards, but ultimately upon all of the people of the State."

The Supreme Court, on direct appeal, granted the motion to affirm and affirmed the judgment upon the limited grounds, quoted directly above, on which this court rested its decision. *Shuttlesworth v. Birmingham Bd. of Education*, 358 U.S. 101, 79 S.Ct. 221, 3 L.Ed2d 145 (1958).

As this court sees it, the law of this case is that the Alabama School Placement Law "furnishes the legal machinery for an orderly administration of the public schools in a constitutional manner by the admission of qualified pupils upon a basis of individual merit without regard to their race or color". Under that law the initiative is with the individual pupil, or those authorized to act in his behalf, to apply for assignment or transfer. Before this court may grant injunctive relief, the administrative remedies provided therein must first have been exhausted.[2]

Although the Court of Appeals for the Fifth Circuit has on frequent occasions come to grips with school segregation problems and has been especially alert to strike down deviations by district courts from the constitutional norm of Brown in sometimes trenchant opinions delivered by able judges,[3] all of which have been carefully read and considered by this court, it has heretofore had no cause to consider whether the Alabama Law has a permissible scope of operation in the desegregation of public schools.

On the other hand, the Court of Appeals for the Fourth Circuit has dealt frequently with the North Carolina Pupil Enrollment Act, strikingly parallel to the Alabama Law. In *Carson v. Warlick*, 238 F.2d. 724 (4th Cir. 1956), cited with approval by this court in Shuttlesworth, the late, great Judge Parker, writing for the court after holding that the North Carolina Act contained adequate standards, observed:

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[2] The appeals to the courts provided by Section 9 of the Alabama School Placement Law are judicial, not administrative remedies. After administrative remedies before the school board have been exhausted, judicial remedies for denial of constitutional rights may be pursued at once in this court without pursuing state court remedies. *Lane* v. *Wilson*, 307 U. S. 268, 274, 59 S.Ct. 872, 83 L.Ed. 1281 (1939); *Carson* v. *Warlick*, 238 F.2d 724, 729 (4th Cir. 1956).

[3] *Brown* v. *Rippy*, 233 F.2d 796 (5th Cir. 1956); *Avery* v. *Wichita Falls Independent School Dist.*, 241 F.2d 230 (5th Cir. 1957); *Orleans Parish School Board* v. *Bush*, 242 F.2d 156 (5th Cir. 1957); *Gibson* v. *Board of Public Instruction of Dade County*, 246 F.2d 913 (5th Cir. 1957); *Rippy* v. *Borders*, 250 F.2d 690 (5th Cir. 1957); *Gibson* v. *Board of Public Instruction of Dade County, Fla.*, 272 F.2d 763 (5th Cir. 1959); *Boson* v. *Rippy*, 275 F.2d 850 (5th Cir. 1960); *Mannings* v. *Board of Public Instruction*, 277 F.2d 370 (5th Cir. 1960); *Boson* v. *Rippy*, 285 F.2d 43 (5th Cir. 1960); *Augustus* v. *Board of Public Instruction*, 306 F.2d 862 (5th Cir. 1962); *Bush* v. *Orleans Parish School Board*, 308 F.2d 491 (5th Cir. 1962).

> "Somebody must enroll the pupils in the schools. They cannot enroll themselves; and we can think of no one better qualified to undertake the task than the officials of the schools and the school boards having the schools in charge. It is to be presumed that these will obey the law, observe the standards prescribed by the legislature, and avoid the discrimination on account of race which the Constitution forbids. Not until they have been applied to and have failed to give relief should the courts be asked to interfere in school administration."

In an unbroken line of decisions[4] that court has continued to apply the doctrine of exhaustion of administrative remedies fairly and lawfully conducted. That is not to say that that court would tolerate a discriminatory application of the Act by refusing assignment or transfer to any school of any pupil because of his race or by requiring the applicant to submit to futile, burdensome or discriminatory administrative procedures.

Superintendent and Board have assured this court that discrete desegregation would be much less disruptive than massive integration. They insist that in implementation of the Alabama Law regulations[5] governing assignment and

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[4] *Covington* v. *Edwards*, 264 F.2d 780 (4th Cir. 1959); *Holt* v. *Raleigh City Board of Education*, 265 F.2d 95 (4th Cir. 1959); *McCoy* v. *Greensboro City Board of Education*, 283 F.2d 667 (4th Cir. 1960); *Jeffers* v. *Whitley*, 309 F.2d 621 (4th Cir. 1962); *Wheeler* v. *Durham City Board of Education*, 309 F.2d 630 (4th Cir. 1962).

[5] 1. Except as otherwise expressly provided by law and these regulations, and subject to supervision and review by the board, the City Superintendent of Schools shall exercise the authority and responsibility of the Board of Education of the City of Birmingham with respect to the assignment (including original and all other admissions to the school system), transfer and continuance of pupils among and within all public schools operated under the jurisdiction of the board.

2. The Superintendent shall have continuing authority to determine the particular public school to be attended by each child

transfer of pupils in the City's public schools have been in effect since June, 1958, and that they stand ready to comply with the law when any individual sets the administrative machinery in motion. This court will not sanction discrimi-

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applying for assignment or transfer to the public schools. No child shall be entitled to be enrolled or entered in a public school until he has been assigned thereto by the superintendent or his duly authorized representative. All school assignments shall continue without change until or unless transfers are directed or approved by the superintendent or his duly authorized representative.

3. Applications for the assignment or transfer of pupils to particular schools shall be directed to the superintendent and shall be delivered to the school principal unless otherwise directed by the superintendent, on forms provided by the superintendent, who will keep supplies of such forms available at the offices of the board.

4. A separate application must be filed for each pupil desiring assignment or transfer to a particular school. Joint applications will not be received or considered.

5. Applications for assignment or transfer of pupils must be filled in completely and legibly in ink or typewriter and must be signed by both parents, if living, or the legal guardian of each child for whom application is made. In case of denial of an application notice thereof will be mailed to the parents or guardian at the address shown on the application, which shall be deemed the final action of the board unless a hearing before the board is requested in writing within fifteen days from the date of mailing of such statement.

6. The superintendent may in his discretion require interviews with the child, the parents or guardian, or other persons and may conduct or cause to be conducted such examinations, tests and other investigations as he deems appropriate. In the absence of excuse satisfactory to the superintendent or the board, failure to appear for any requested examination, test or interview by the child or the parents or guardian will be deemed a withdrawal of the application.

7. The delivery of such forms shall not constitute a request for hearing by the board. If a hearing by the board is requested with respect to the superintendent's conclusion on an application, the parents or guardian will be given at least five days' written notice of the time and place of the hearing. The hearing will be begun within thirty days from the receipt by the board of the request, but the board may in its discretion postpone the hearing upon request.

nation by them in the name of the placement law but it is unwilling to grant injunctive relief until their good faith has been tested. If it should be demonstrated that it has been unconstitutionally applied, under the settled authorities the court would be compelled to order the submission of a desegregation plan for its approval.

Adequate time remains before the opening of the September, 1963, school term for the processing of applications for assignments or transfers in behalf of interested individuals. Jurisdiction of this action will be retained for the purpose of permitting the filing of such supplemental complaint, if any, as might be entitled to be presented, in case of any unconstitutional application of the Alabama School Placement Law against the plaintiffs, or others similarly situated, or of any other unconstitutional action on the part of defendants against them. The issues tendered by any supplemental complaint will be given a preferred setting on the docket of this court and will be heard on five days notice to defendants.

Failure of the parents or guardian to appear at the hearing will be deemed a withdrawal of the application.

8. Hearings may be conducted before the board, or before a committee of not less than three members thereof, or a member thereof, or such person as the board may designate as a hearing examiner as provided by law. Hearings will be held at such times and places as the board or its committee or hearing examiner may lawfully determine and may be adjourned from time to time for the convenience of parties, witnesses, or the board or hearing examiner; provided however that nothing herein shall preclude any applicant from filing a request for hearing in accordance with Section 7 of the Placement Act and the right to have such hearing held beginning with the time prescribed therein.

9. Unless postponement is requested by the parents or guardian, the board will notify them of its decision within twenty days after the conclusion of the hearing. Exceptions to the decision of the board may be filed, as allowed by law, within five days of notice of the board's decision, and the board shall meet within fifteen days of the receipt of the exceptions to consider the same.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, BRUNSWICK DIVISION

LINDA SUE GIBSON, by next friend, et al., *Plaintiffs*,

v.

GLYNN COUNTY BOARD OF EDUCATION, et al., *Defendants*.

U.S. District Court, Brunswick Division
Filed In Office
September 6, 1963
/s/ Mary R. Cross
Deputy Clerk

PRE-TRIAL ORDER

UPON the pleadings, the motion for intervention and papers submitted in support thereof, upon the arguments and admissions of counsel for the parties and intervenors made at a pre-trial hearing held this 6th day of September, 1963, pursuant to Rule 16 of the Federal Rules of Civil Procedure, it is:

ORDERED,

1. The motion for intervention is granted, and the objections of defendants thereto are overruled. The Intervenors shall serve copies of their pleadings upon the other parties to the action and shall designate H. T. Ward, 859½ Hunter Street, N. W., Atlanta, Georgia for service of further papers in the action. The caption of the case shall be deemed amended accordingly.

2. Defendants shall prepare and submit to the Court with reasonable promptness a plan for reorganization of the schools subject to their jurisdiction along non-racial lines which shall not exclude from transfer between schools any applicant therefor solely on the grounds of color or other criterion unrelated to the

educational and physical advancement and well being of the children concerned. Open hearings thereon shall be held by defendants sitting as a school court pursuant to Sec. 32-910 of the Georgia Code Anno. as amended, and both plaintiffs and intervenors shall be afforded full opportunity to be heard therein on the contentions contained in their pleadings.

3. Defendants shall report such plan to the Court for its approval and shall give two weeks notice of hearing before this Court thereon to all other parties. Defendants shall further recommend to the Court at such time whether to approve or reject the prior transfer orders as being in accord with or outside the ambit of the plan so recommended. Plaintiffs and intervenors shall serve and file exceptions to the report not less than two (2) days before the date noticed for hearing thereon.

4. The issues reserved for trial herein under the pleadings of plaintiffs and intervenors shall be limited to those contained in their exceptions and the evidence to be received thereon shall be limited to that contained in the transcript made before the Board.

5. All other questions shall be held in abeyance pending the coming in of the Board's report and the hearing thereon.

/s/ F. M. Scarlett,
United States District Judge.

September 6, 1963.

ATTEST: A TRUE COPY

Certified to September 6, 1963
/s/ Mary R. Cross
Deputy Clerk

Office Supreme Court, U.S.
FILED
JAN 14 1964
F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. 670

BOARD OF EDUCATION OF THE CITY OF BIRMINGHAM, *et al.*,
Petitioners,

—v.—

DWIGHT ARMSTRONG, *et al.*

LINDA SUE GIBSON, *et al.*,
Petitioners,

—v.—

CAROLYN ELEANOR HARRIS, *et al.*

LAWRENCE ROBERTS, *et al.*,
Petitioners,

—v.—

RALPH STELL, *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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—v.—

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—v.—

RALPH STELL, *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinions of the Court of Appeals are printed in the appendix to the petition for certiorari and have been reported as follows: *Stell* v. *Savannah-Chatham County Board of Education*, 318 F. 2d 425; *Armstrong* v. *Board of Education of City of Birmingham, Ala.*, 323 F. 2d 333; *Harris* v. *Gibson and Glynn County Board of Education*, 322 F. 2d 780.

Jurisdiction

The order of the Fifth Circuit in the Savannah case (*Stell*) was entered on May 24, 1963.[1] The order of the Fifth Circuit in the Birmingham case (*Armstrong*) was entered on July 1[illegible] 1963. The petition for certiorari in all three cases was filed in this Court on December 11, 1963, six and one-half months after the order in the Savannah case and nearly five months after the order in the Birmingham case. It is submitted that the petition in the Savannah and Birmingham cases is out of time.

The order of the court of appeals in the Glynn County case was entered on September 12, 1963. No jurisdictional objection is made to the petition in that case.

Questions Presented

1. Where an order of a court of appeals is reviewable by certiorari, can review of that order be sought more than ninety days after entry?

---

[1] In all three cases the Fifth Circuit's order is embodied in the opinion. No separate judgment was entered.

2. Where the facts are not disputed and a district court has enjoined limited public school desegregation undertaken voluntarily by a local school board, does a court of appeals lack the power to prevent mootness and irreparable injury by directing the district court to issue an injunction pending appeal?

Statutes Involved

These cases involve, in addition to the statutes cited in the petition for certiorari:

28 U. S. C. §1254(1):

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U. S. C. §2101(c):

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Rules of the Supreme Court, Rule 20:

> Certiorari to a Court of Appeals Before Judgment
>
> A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to

require immediate settlement in this court. See *United States* v. *Bankers Trust Co.*, 294 U. S. 240; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330; *Rickert Rice Mills* v. *Fontenot*, 297 U. S. 110; *Carter* v. *Carter Coal Co.*, 298 U. S. 238; *Ex parte Quirin*, 317 U. S. 1; *United States* v. *United Mine Workers*, 330 U. S. 258; *Youngstown Co.* v. *Sawyer*, 343 U. S. 579.

Statement

Savannah, Georgia (*Roberts* v. *Stell*)

Suit was filed in the district court on January 18, 1962, to desegregate the public school system of the City of Savannah and the County of Chatham, Georgia. The Negro plaintiffs' motion for preliminary injunction was not heard until May 9-13, 1963, and then only because Chief Judge Tuttle of the Fifth Circuit had implied, in response to a petition by plaintiffs, that another district judge would be assigned if no ruling were made by May 13, 1963.

On May 9, 1963, the plaintiffs proved conclusively that the schools were segregated, and the defendant Board of Education offered no contradictory evidence. Nevertheless, the district court refused to grant a preliminary injunction, but allowed intervening white defendants—petitioners here—to put on evidence of alleged inferiority of Negroes as a group and supposed injury to both races as a consequence of integration. On May 13, 1963, the district court found that "the primary and secondary public schools of Savannah-Chatham County are divided into schools for white pupils and schools for Negro pupils and admission thereto is limited to applicants of the respective races." However, it denied injunctive relief.

Following plaintiffs' notice of appeal and a motion for injunction pending appeal, the Fifth Circuit on May 24, 1963, issued an order directing the district court to enjoin segregation in accordance with *Brown* v. *Board of Education*, 349 U. S. 294. The district court was further ordered to require the submission of a plan including grade-a-year desegregation beginning the following September.[2]

The petition for certiorari in this case was filed December 11, 1963, on behalf of the intervening white defendants. The Board of Education did not join in the petition. The record filed in this Court contains essentially only those papers filed with the Fifth Circuit after the filing of the motion for injunction pending appeal. The record of proceedings in the district court has not been filed in this Court.

Birmingham, Alabama (*Board of Education v. Armstrong*)

In Birmingham, the suit to desegregate the public schools was instituted on June 17, 1960. At trial in October, 1962, overwhelming evidence of complete segregation was presented. As the district court summarized the "undisputed facts":

> . . . it graphically appears from the testimony of Dr. Theo R. Wright, Superintendent of Birmingham Public Schools, that he and the Birmingham Board of Education have operated a segregated school system based upon race in the past, are doing so now, and have formulated no plans to discontinue such an operation.

---

[2] Subsequently, the district court issued the required injunction. The Board of Education submitted a plan, and plaintiffs submitted objections. The district court refused to rule on the objections. Nevertheless, fourteen Negroes actually entered white schools in September 1963, and the transfer applications of seven others were accepted.

The record on appeal has been printed, and appellants have submitted their brief to the Fifth Circuit. In addition, a supplemental record of events occurring since the injunction has been filed with the Fifth Circuit for printing.

On May 24, 1963, the district court denied injunctive relief on the ground that administrative remedies provided by the Alabama Pupil Placement Act had not been exhausted. On plaintiffs' motion for injunction pending appeal, the Fifth Circuit ruled that exhaustion of those remedies was not a prerequisite to relief in the federal courts. Its order of July 12, 1963, directed the district court to issue an injunction pending appeal enjoining compulsory segregation and requiring the submission of a plan by August 19, 1963, for a start on desegregation by September.

The petition for certiorari in this case was filed December 11, 1963, on behalf of the defendant Board of Education. The record of proceedings in the district court has not been filed in this Court.

Glynn County, Georgia (*Gibson* v. *Harris*)

This is not a typical school segregation case. Before any suit was filed the Glynn County Board of Education voluntarily granted the applications of six Negro students for transfer to the white high school. The plaintiffs, a group of white students and parents, obtained a temporary restraining order from the district court enjoining the school board from effecting the proposed transfers on August 27, 1963, the day before the school term began. A group of Negro students and parents intervened as defendants and requested an injunction restraining interference with the six proposed transfers and desegregating

---

[3] Subsequently the required injunction was issued. The Board of Education submitted its plan, which was approved before plaintiffs had an opportunity to see it. Five Negro students were admitted to white schools in September.

The record in the Fifth Circuit has been printed, and appellants have submitted their brief. A supplemental record of events occurring since the injunction will be submitted by appellants soon.

the school system. On September 6, 1963, the district court entered a "pre-trial order" outlining a time-consuming program for the preparation of a plan for assignment and transfer, and ordered all other questions "held in abeyance." The intervenors appealed.

On intervenors' motion the Fifth Circuit on September 24, 1963, construed the second district court order as a preliminary injunction restraining the proposed assignments. The Court of Appeals vacated both of the district court's orders and issued its own order directing the district court to issue an injunction pending appeal requiring the Board of Education to admit the six Negro students to the white school.[4]

The petition for certiorari in this case was filed December 11, 1963, on behalf of the plaintiffs, white parents and students. The Board of Education did not join in the petition. The record filed in this Court does not contain the record of proceedings in the district court.

---

[4] Subsequently, the district court entered the required injunction; and the six Negro students were admitted to the white school.

The record on appeal in the Fifth Circuit has been printed. Appellants' brief is due February 1, 1964.

The Board of Education has also appealed to the Fifth Circuit from the district court's order of September 6, 1963, and order in compliance with the Fifth Circuit's mandate.

ARGUMENT.

I.

The Petition in the Savannah and Birmingham Cases Is Out of Time and Must Be Denied.

In the Savannah and Birmingham cases, the orders sought to be reviewed were entered by the Fifth Circuit on May 24, 1963, and July 12, 1963, respectively. The petition was filed on December 11, 1963, well in excess of the ninety-day limitation. 28 U. S. C. §2101(c).

Petitioners seek to avoid the consequences of their default by resort to 28 U. S. C. §2101(e), which provides no time limitation for a petition for certiorari to review a case before judgment in the court of appeals. Reasoning that the Fifth Circuit has not finally disposed of the main appeal in these cases, petitioners contend that they may petition for review of the interlocutory rulings attacked here at their leisure. Such an argument plainly misconceives the role of certiorari before judgment. Limited to cases of extraordinary consequence, see Rule 20 of this Court, certiorari before judgment is designed to eliminate unnecessary delay, not excuse it.

The statute allowing certiorari before judgment, 28 U. S. C. §1254(1), creates a procedural device for review of district decisions where the normal delay of intermediate appeal is intolerable. Petitioners here, having prevailed in the district courts, are not asking review of the district court decisions. What they ask is review of a narrow procedural issue arising from the court of appeals' interlocutory rulings. Their petition comes not only after that ruling, but five and six months after the decree.

Another purpose of certiorari before judgment is to dispel confusion by deciding the entire case rather than awaiting piecemeal appeals. Here, certiorari before judgment might properly be invoked on behalf of the Negro school children—respondents in all these cases—to have the entire records sent to this Court from the district courts for reaffirmation of their right to relief under the doctrine of *Brown* v. *Board of Education*, 347 U. S. 483. But a grant of certiorari now for review merely of the propriety of the Fifth Circuit's action in protecting its jurisdiction would constitute a classic instance of piecemeal appeal. The main issues of the cases would remain unresolved, as this Court does not even have the benefit of the district court records.

The laws of procedure do not deprive petitioners of an opportunity to question the Fifth Circuit's interlocutory orders. They had ample opportunity to petition for review after the rulings were handed down.[5] However, in the absence of an extension, they were entitled to only ninety days, which had long since passed when this petition was filed.

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[5] In a similar case, the school board did just that. The petition was denied. *Board of School Commissioners of Mobile County* v. *Davis*, 375 U. S. 894.

II.

The Petition Should Be Denied in the Glynn County Case Because There Is No Serious Doubt as to the Fifth Circuit's Power to Rule as It Did and No Conflict of Circuits on the Question.

In the Glynn County case plaintiffs sought and obtained from the district court a temporary restraining order preventing the School Board from voluntarily effecting a limited degree of desegregation. The court's order was issued without notice on the day before school opened. The pre-trial order, in effect extending the duration of the restraining order, came after school had been in session for a week. Thus, some of the six Negro students, whose transfer applications had been accepted by the school authorities, had already been subjected to segregated schooling for a part of their final school year. By the time the Fifth Circuit issued its order, another two weeks had passed.

The Fifth Circuit vacated the temporary restraining order and pre-trial order, thus sustaining for the time being the school board's action in granting the transfers. In order to resolve any confusion in the school board's mind, the court of appeals also ordered the district court to require the admission of the Negro students by injunction.

The petitioners attack only that part of the court of appeals' order directing the district court to enter an injunction pending appeal. However, the petitioners were not parties to the injunction, and there is some question of their standing to assert its invalidity. Only the Board of Education and its members were enjoined, and they have not petitioned for review.

Moreover, the court of appeals' order adverse to petitioners' claim was not so much the injunction pending appeal as the vacation of the district court orders. By vacating the temporary restraining order and pre-trial order, the court of appeals freed the school board to follow its previously declared policy of admitting the Negro students to the white school. The petitioners make no claim that the court of appeals lacked power to vacate the district court's orders, and no such claim could seriously be made. The court of appeals had before it the verified pleadings on which the district court acted and thus was in a position to determine whether the district court's orders were erroneous.[6]

Thus it appears that petitioners, if they are not the wrong parties, are at least attacking the wrong order. Nevertheless, in response to their contentions, it is clear that the issue raised need not trouble the Court. Petitioners argue that a court of appeals is without power, irrespective of the circumstances, to issue a mandatory injunction pending appeal which changes the status quo. They contend that, aside from the three cases involved here and a similar case in which certiorari was recently denied,[7] the only four cases dealing with this issue have been decided contrary to the decisions below. This is far from correct.

The four cases cited by petitioners as creating a conflict of circuits are *Dunn* v. *Retail Clerks Int'l Ass'n*, 299 F. 2d 873 (6th Cir. 1962); *Hess* v. *Woods*, 185 F. 2d 404 (9th Cir. 1950); *Meredith* v. *Fair*, 305 F. 2d 341 (5th Cir. 1962); and *Greene* v. *Fair*, 314 F. 2d 200 (5th Cir. 1963). None of these cases holds that a court of appeals lacks power to issue, pending appeal, a mandatory injunction changing the status quo. Each merely represents an instance in which the court of appeals concluded that the circumstances did not justify such relief.

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[6] At the hearing on the motion for injunction pending appeal, plaintiffs' verified complaint and intervening defendants' verified complaint were submitted to the Fifth Circuit.

[7] *Board of School Commissioners of Mobile County* v. *Davis*, 375 U. S. 894.

In the *Dunn* case, where the appellants sought an order, pending appeal, directing the Regional Director of the NLRB to file suit to restrain picketing of the appellants' premises, the Sixth Circuit noted that the Regional Director could refuse to file suit in the exercise of his discretion, and even if he did file the District Court might properly deny relief. In conclusion, the Sixth Circuit stated, "We think there is sufficient doubt about whether appellant will ultimately prevail as to make the granting of a mandatory injunction pending appeal *inadvisable*." (Emphasis added.) 299 F. 2d at 874.

In *Hess* v. *Woods*, 185 F. 2d 404 (1950), where the appellants sought to enjoin continuing enforcement of The Housing and Rent Act of 1947, the Ninth Circuit refused "to suspend all activity of an important governmental agency" pending appeal. The court's holding that "No such order with such far-reaching consequences should be made by any court before the merits of the controversy have been tried and adjudicated," 185 F. 2d at 404, is far from a repudiation of the power to grant interlocutory relief under appropriate conditions.

In *Meredith* v. *Fair*, 305 F. 2d 341 (1962), the Fifth Circuit refused in February 1962 to order James Meredith's admission to the University of Mississippi for the latter half of the school year pending appeal from the district court's decision. Balancing the equities in this case, the Fifth Circuit concluded that appellant's hardship was not sufficient to justify immediate relief pending a complete review of the proceedings below. The court also noted that normal appellate process could be followed in time for the beginning of the next complete school year.

The last case cited by petitioners is *Greene* v. *Fair*, 314 F. 2d 341 (1963), in which the Fifth Circuit refused to order, pending appeal, the admission of another student to the University of Mississippi. Observing that the "extraordinary" relief requested "is granted only in exceptional cases," 314 F. 2d at 202, and where ultimate success is virtually certain, the court merely held that appellant had not met the strict standard. The Fifth Circuit listed a number of issues of doubtful determination remaining in the case.

That the asserted conflict of circuits is more apparent than real comes as no surprise. A court of equity is necessarily invested with broad powers to grant effective relief, and an appellate court must be empowered to preserve its appellate jurisdiction. Congress has provided the courts of appeals with the necessary tools, and has done so in inclusive terms. 28 U. S. C. § 1651(a); 28 U. S. C. § 2106. See also F. R. C. P., Rule 62(c),[8] (g).[9] While these powers must be exercised judiciously, the scope of judicial discretion is broad indeed.

---

[8] Rule 62(c) provides:

> "When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. * * *"

[9] Rule 62(g) provides:

> "The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered."

Nevertheless, it is contended by petitioners that a hard and fast rule prevents a court of appeals from issuing an injunction changing the status quo pending the determination of the appeal. In other words, no matter what the circumstances and no matter what other powers the court of appeals may possess, this type of relief is absolutely forbidden. Such a wooden limitation on an equity court would be anomalous indeed.[10] In this case the anomaly is all the more starkly presented, for there is significant doubt about which parties were attempting to preserve the status quo. Certainly the Negro intervenors were attempting to preserve the status quo existing when the school board granted their applications for transfer. The plaintiffs interpret status quo altogether differently.

Unless the court of appeals was totally lacking in power to grant the relief requested of it, the Fifth Circuit acted properly. Faced with the preposterous situation of a federal judge interfering with voluntary school desegregation, it stepped in to prevent the passage of time from vitiating the Negro students' undoubted constitutional rights.[11]

---

[10] Assuming that this Court could consider the merits of the petition in the Savannah and Birmingham cases, it is apparent that the Fifth Circuit had the same broad power to balance the equities and grant appropriate relief in those cases.

[11] It has been suggested that the Negro intervenors were granted all the relief they had requested. To the contrary, the Fifth Circuit did not order complete desegregation or the formulation of a desegregation plan. It merely provided for the transfer of those Negro students previously admitted to the white school.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 670

THE BOARD OF EDUCATION OF THE CITY OF BIRMINGHAM, *et al.*,
Petitioners,

v.

DWIGHT ARMSTRONG, *et al.*,
Respondents.

LINDA SUE GIBSON, *et al.*,
Petitioners,

v.

CAROLYN ELEANOR HARRIS, *et al.*,
Respondents.

LAWRENCE ROBERTS, *et al.*,
Petitioners,

v.

RALPH STELL, *et al.*,
Respondents.

PETITIONERS' REPLY

Petitioners, having this day received respondents' brief in opposition, respectfully submit for their reply:

I.

1. Timeliness as to all three cases arises from the authority of 28 USC §2101(e) to apply for writ of certiorari "at any time before judgment [in the Court of Appeals]."

2. Additionally, timeliness of the application as to *Gibson* is conceded. Since the single petition authorized by Rule 23(5) is timely in part, it must be timely as to all, since the issue is unitary in character.

3. Respondents argue without citation that this Court is limited under §2101(e) to consideration of the merits of the action of the District Court which the Court of Appeals is reviewing.

(a) There is no such limitation in the statutory language.

(b) It is §2101(c)—the 90 day provision—rather than 2101(e) which is limited to "judgment or decree" as opposed to the authority of this Court under §2106 over "judgment, decree, or order." The questioned rulings are clearly "orders" in this legislative classification.

4. There has been no delay. One or two such orders as are here complained of may be error, but they do not rise to the status of a judicial practice meriting extraordinary review. It is the cumulation of the four uniquely similar orders that creates the situation of "imperative public importance" described in Rule 20.

II.

The merits are not here in issue, and petitioners accordingly have been prejudiced by respondents' characterizations and comments on the lower court rulings. If the underlying issues are deemed pertinent to the Court's decision, petitioners pray an opportunity to be heard in opposition.

III.

The absence of any citation of precedent or textual support in respondents' brief for the assertion of substantially unlimited writ powers in Courts of Appeals confirms the conclusion of our own research that no orders of the character of the four here sought to be reviewed have ever previously been issued by any Court of the United States.

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January 17, 1964

Office-Supreme Court, U.S.
FILED
[illegible] 25 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 674.

AUTOMOBILE TRANSPORTERS WELFARE FUND and WALTER F. CAREY, DENTON JOLLY, E. J. HAND, JAMES R. HOFFA, CHARLES E. BOND and WILLIAM R. WALSH, Trustees of AUTOMOBILE TRANSPORTERS WELFARE FUND,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 674.

AUTOMOBILE TRANSPORTERS WELFARE FUND and WALTER F. CAREY, DENTON JOLLY, E. J. HAND, JAMES R. HOFFA, CHARLES E. BOND and WILLIAM R WALSH, Trustees of AUTOMOBILE TRANSPORTERS WELFARE FUND,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

RESPONDENTS' ATTACK ON PETITIONERS' MOTIVE IN FILING THE PETITION IS ABSURD AND THEIR CHARACTERIZATION OF PETITIONERS' POSITION IN THE COURT BELOW ERRONEOUS

Respondents state:

> "[T]he only possible reason for the petition here is not the fear of any duplication in examination or in the requirement for reimbursement but actually to hobble effective regulation and supervision by anyone over the financial affairs of these funds." (Resp. Br., p. 7)

But Petitioners do not object to the audit conducted by New York State; they object to the charging of the cost of the audit to the Fund. Therefore, a decision in Petitioners' favor would not deprive New York of the right to audit the Fund, but only of the right to charge it for the audit. Since it is inconceivable that requiring New York to pay its own way would deprive New York of its ability or desire to provide effective regulation and supervision of the Funds' financial affairs, Respondents' imputation of evil motive is absurd.

Not content with impugning Petitioners' motive, Respondents distort Petitioners' position before the New York Court of Appeals. This court can best judge Respondents' characterization (Resp. Br., pp. 7, 10) by reading the pertinent portion of Petitioners' brief below:

> "Thus, Congress has established the general rule that state law is inapplicable to agreements reached by collective bargaining. . . .
>
> "However, since adequate legal supervision over the operations of welfare funds requires the application of principles of trust and insurance law Congress left open a small area in which states could supplement the federal policy of encouraging parties to bargain collectively over welfare benefits by providing beneficiaries additional protection that the assets of funds would be utilized for the purposes for which they were accumulated (1958 Welfare Disclosure Act). Even though state regulation is permitted for this limited purpose in this area, as in other areas which Congress 'designedly left open for state control,' state legislation which 'impairs, dilutes, qualifies or in any respect subtracts from any of the rights guaranteed and protected by the Federal Act' is invalid. *Allen-Bradley Local 1 v. Board*, 315 U.S. 740, 750."
>
> (Petitioners' Brief, New York Court of Appeals, pp. 13-14.)

Two other statements of Respondents' merit comment. On page 9, Respondents state, in italics:

> "The expense of the audit is no more than the other expenses of the administration of these funds."

The Fund's administrative expenses enable it to provide protection for the covered employees who benefit from such expenses; its expense in paying for New York's audit relieves New York of this expense. The latter expense, then, unlike the former, does not redound to the benefit of the covered employee but to the benefit of the New York taxpayer.

On the same page, Respondents assert "that the Fund might be subjected to the expense of an audit by more than one state is fanciful." Respondents advance two reasons for this assertion: one, the Fund has not yet been subjected to multiple charges; and two, Section 37-k permits the Superintendent of Insurance to waive an audit of the Fund. The *possibility* of multiple charges is not, however, negated because such charges have not, as yet, been imposed. Nor does the existence of the Superintendent's discretion to waive an audit negate such a possibility. Respondents do not argue that the absence of this discretion would render Section 37-k unconstitutional. Under Respondents' analysis, then, other states—and New York—may charge the Fund without providing for such discretion.

More important is the light this discretionary power sheds upon the issue before the Court. "The question [of preemption] is one of Congressional intent." *Guss v. Utah Labor Relations Board*, 353 U. S. 1, 10. Clearly, state legislation empowering a local official, who acts on the basis of state not national considerations, to subject multi-employer, multi-state welfare funds to multiple charges can only impede the creation and growth of funds.

that Congress has sought to foster. This power, as well as the requirement in this case that the Fund divert its assets from the purposes agreed upon by the parties to a state purpose, demonstrates the challenged legislation's conflict with Congressional intent.

Therefore, the challenged legislation should not be permitted to stand.

CONCLUSION.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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